

CASES

ARGUED AND DETERMINED

IN

THE SUPREME COURT

OF

THE STATE OF MISSOURI

OCTOBER TERM 1874 AT ST. LOUIS.

[CONTINUED FROM VOL. LVII.]

WM. HARPER, *et al.*, Respondents, *vs.* WM. C. MANSFIELD, *et al.*,
Appellants.

1. *Administrator, sale by*—*Purchase by administrator at, will be held in trust for estate, when.*—The statute requiring the appraisement of land held by an administrator before he can purchase the same, has no application to his purchase of land sold under deed of trust given by the decedent. But he cannot in such case speculate on the interests of the creditors and distributors of the estate, and sacrifice them to his own individual interest. Such a purchase would be presumed to be for the benefit of the estate; and at all events would be closely examined by a court of equity, if questioned by those interested in the estate.

And where it appeared that although nominally made by the trustee named in the deed of trust, the sale was in fact prompted by the administrator, the latter would be regarded in a court of equity as the vendor, and his purchase would be held to have been made in trust for the benefit of the estate.

2. *Mortgage and deed of trust—Sale—Trustee must be present, etc.*—The trustee in a deed of trust must be present in person at the trust sale and watch over it, and adjourn the sale, if necessary, in order to prevent a sacrifice of the property. And no one can do it in his stead, unless empowered in the instrument conferring the trust. (*Graham vs. King*, 50 Mo., 24.)

Harper, et al. v. Mansfield, et al.

*Appeal from Audrain Circuit Court.**Ira Hall*, for Appellants.

I. Defendant, Mansfield, had the right to purchase the land at the sale. He was not trustee for the sale of the land. The rule that a trustee cannot purchase at his own sale of property of which he is trustee, has no application to him. The rule is that the trustee cannot purchase from himself. He cannot sustain the two characters of purchaser and seller. But defendant, Mansfield, was in no way connected with the trust nor had any control or direction of the sale. (Hill Trust., § 535, [3rd Ed.]; 2 Wash. Real Prop., [2nd Ed.] pp. 176, 177, 210; Dempster vs. West, Chic. Leg. News, vol. 6, p. 335; 2 Sugd. Vend., 112, 126, note.)

Craddock & Musick, for Respondents.

I. Defendant, Mansfield, held a fiduciary relation towards the creditors of his intestate, and was under obligation to look after their interests with the most conscientious scrupulousness. He could not speculate or make a profit at their expense. Any purchase of property of his intestate at a sacrifice would be for their benefit, and when, after such purchase of his intestate's lands, he attempted to take the profits of the purchase to himself and deny the rights of the creditors and his trusteeship for them, it was fraud of the most patent character. (2 Hill. Torts, ch. 26, §§ 1, 2.)

NAPTON, Judge, delivered the opinion of the court.

This proceeding was instituted by the creditors of Thos. B. Mansfield, who died in Oct., 1871, to set aside the sale of the decedent's farm made under a deed of trust given by said Mansfield to secure the purchase money. The plaintiffs were creditors to the amount of six or seven hundred dollars, and their claims had been allowed against the estate and placed in the 5th class.

Mansfield, the decedent, had in Feb'y, 1868, purchased a tract of land lying in Audrain County, near Mexico, of 100

Harper, et al. v. Mansfield, et al.

acres, at the price of a thousand dollars, of a lady named Breckenridge, and had obtained a deed for the same and executed his notes for this sum, and to secure them had given a deed of trust on this land, making one Hook, who is one of the defendants in this case, trustee, with authority to sell on non-payment, and on specified notices and at a specified place. Miss Breckenridge was also made a party defendant in this case.

Mansfield paid \$200 on those notes in 1870, and died in 1871, and the principal defendant, W. C. Mansfield, his brother, was appointed administrator.

The 100 acres of land mortgaged to pay this indebtedness to Breckenridge, was the only land owned by the deceased, and the personal assets were insufficient to pay off the creditor in the 5th class, after the payment of such claims as had priority and the widow's claim under the statute.

The petition, after stating the above facts, proceeded to charge that the defendant, W. C. Mansfield, for the purpose of defrauding the creditors aforesaid, without the knowledge of Hook, the trustee, and without the consent or request of Breckenridge, the *cestui que trust*, procured an advertisement in the name of Hook, to be inserted in the newspapers printed at Mexico, offering the said land for sale on the terms, and at the place, and in the mode provided for in the deed of trust; that afterwards, and on the day named in the advertisement, he fraudulently had the same put up for sale at the hour of 11 A. M., and cried off to the highest bidder by an auctioneer named Rodman; that said W. C. Mansfield became the purchaser for one thousand dollars, and fraudulently procured a deed from said trustee, Hook.

All this is charged to have been done by said Mansfield, administrator aforesaid, in order to get the property at an under value; and it is claimed that he paid off the note still due on the mortgage to Breckenridge for \$800 by giving his notes to said Breckenridge, and the remainder of his bid by giving a receipt to Hook as administrator for a claim said Hook had against the estate for \$108.34, and to secure his

Harper, et al. v. Mansfield, et al.

notes to Breckenridge, he gave her a deed of trust on the same land, and made said Hook trustee. It is alleged that the land was worth (\$2,000) two thousand dollars.

The answer of defendant, W. C. Mansfield, denied all fraud, asserted that he had nothing to do with the sale, except to bid for the land; asserts that the land brought a full price and more than it would at the time of the answer; and avers that he bought the land, not as administrator, but on his own individual account. •

The testimony in the case need not be stated in detail. It clearly appears that this sale under the deed of trust to Hook was not made at Hook's instance nor at the instance of the beneficiary, Miss Breckenridge. It seems to have been suggested and arranged by a lawyer named Edwards, perhaps on the direction of his client, the defendant, who was administrator of the estate and who doubtless consulted Edwards on the subject. The year had elapsed since the death of the mortgagor, and the mortgagee or trustee had an undoubted right to sell. It does not appear that the auction was conducted in any way unfairly, nor does it appear that it was sold at an unreasonable hour. It was sold at 12 m. and the deed of trust did not specify any hour of the day when the land was to be sold.

A great many witnesses were examined as to the value of this land, and as usual in such cases, opinions varied very much; but one of the witnesses swore he came to Mexico prepared to bid fifteen hundred dollars for it, and another that he offered defendant, after the sale, five hundred dollars for his bargain, and it may be concluded therefore, that the land was not sold to the best advantage.

The decree of the court was based on a special finding of facts, in substance these. The court finds, in reference to the purchase of decedent, the deed of trust to Hook, and the death of the purchaser, Mansfield, and the appointment of his brother, the defendant, as administrator, and the debts and assets of the estate, as heretofore stated in regard to undisputed facts, and then proceeds to find, that "said defend-

ant, W. C. Mansfield did, with the purpose of cheating and defrauding the creditors of said estate, fraudulently procure to have said real estate advertised over the name of, and without the knowledge or consent of, said defendant, said T. Hook, as such trustee, to be sold at the court house door in the city of Mexico, in the county and State aforesaid for cash, on the 30th day of November, 1872, by one Benj. Rodman, auctioneer; that said defendant, Hook, as such trustee in said deed of trust, was not present at said sale of said real estate, and gave no orders or directions, but that said W. C. Mansfield, defendant, administrator of said Thomas Mansfield's estate, with his attorney procured the said auctioneer and ordered him to sell for cash, and that there were only four or five persons present at said sale; that said sale was made under orders and directions of said defendant, W. C. Mansfield and his attorney, S. M. Edwards, and at a much earlier hour in the day than is usual and customary in public sales of sheriffs and trustees in the county of Audrain; and that said W. C. Mansfield did, at such sale, fraudulently and with intent to defraud the creditors of said Thomas Mansfield's estate, buy all of said real estate for the sum of one thousand dollars. And the said defendant, W. C. Mansfield, did then forthwith send for said defendant, Hook, trustee, about four or five o'clock P. M., on the day of sale, and procure the said Hook, as such trustee, to make a deed to him, W. C. Mansfield, and did then and there, without the knowledge of said Hook, make a deed to said Hook, to secure said Breckenridge, etc.; that said land was at the time of said sale reasonably worth \$1,500, etc.; that this sale was a fraud on the creditors, and, therefore, the court decrees the sale and deed to W. C. Mansfield null and void. And it was further ordered that Hook proceed to sell the land again at a time specified in the decree. And said W. C. Mansfield, defendant, was ordered to pay the costs.

The testimony in the case clearly established all the main facts found by the court; but the inference that they constituted fraud on the part of the defendant, the administrator, is denied.

If we agree with the court below, that the facts and circumstances attending this sale show a fraudulent intent on the part of the defendant, and a successful pre-concerted plan to get the title of this land at an under value, the question concerning his right to buy as the administrator can be of no importance.

The testimony clearly shows, that neither Hook, the trustee, nor Breckenridge, the *cestui que trust*, had anything to do with the advertisement or sale, though both acquiesced in it, after it was made. Indeed, as Miss Breckenridge secured the money due her, and Hook had no interest whatever in the matter, there was no reason why they should object. It is clear also, that the land was bought for less than it could have been sold for at the time of the sale. The day was cold and stormy and the hour selected for the auction may have been untimely. But all the facts in the case, excluding the particular position occupied by the defendant as administrator, would hardly have authorized the decree.

The interest of buyer and seller is antagonistic, as the buyer's is to get property at the lowest price, and the seller's is to make it go as high as possible, and therefore, trustees with authority to sell, are not allowed to buy. Hence a mortgagee, who is invested with a power of sale, is not allowed to buy, but his purchase is not absolutely void, but simply leaves the property subject to redemption at a reasonable time thereafter, and if acquiesced in will be binding. This doctrine, however, is at the base of the rule laid down by courts of equity, in considering the right of trustees to buy property, which they are authorized to sell.

This rule, however, does not apply to executors or administrators here because our statute allows them to buy, but guards against the dangers of such purchases, by requiring an appraisement, of the land sold, by disinterested persons.

The present is not one of a purchase by an administrator of land sold by him in that capacity. It was a purchase made by him at a sale under a mortgage or deed of trust which he could not prevent, and which he, as administrator, had no

Harper, et al. v. Mansfield, et al.

authority to hasten. But as he was a trustee for the distributees, heirs, and creditors of the estate, it was certainly his duty to see that the interests of heirs, distributees and creditors should not be sacrificed, and he could not speculate upon these interests and sacrifice them to his individual interest. Such a purchase would be presumed to be for the benefit of the estate, and at all events, would be closely examined by a court of equity, if questioned by those interested in the estate. And certainly, if it appeared that though nominally the sale was made by the trustee in the mortgage or deed of trust, it was in fact prompted by the administrator, the latter would be regarded as the vendor in a court of equity, and his right to purchase would be upon the same basis as if he himself had been the vendor.

And the facts found by the court in this case and sanctioned by the evidence, seem to warrant the conclusion, that this sale was set on foot solely by the administrator or his attorney. It is true that the trustee acquiesced when informed by the defendant's attorney that "they had concluded to sell under the deed of trust;" but this was, as the trustee states in his testimony, on the supposition that the beneficiary in the deed had been consulted and had ordered the sale. The evidence of Miss Breckenridge, the beneficiary, however, shows that she was not consulted; that considering her debt safe, she had no wish to have the land sold.

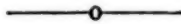
The facts disclosed in this case, moreover, show that the trustee was not present at the sale, and this court has decided expressly in *Graham vs. King*, (50 Mo., 24,) that "he must be present in person, and watch over the sale and adjourn it, if necessary, to prevent a sacrifice of the property; and no one can do it in his stead unless empowered in the instrument conferring the trust."

But the prominent fact is, that the administrator of the estate who is, in the eye of the law, regarded as a trustee for distributees and creditors, prompted the sale through his attorney. There was in this no impropriety, if his object was merely to relieve the estate of the mortgage. But he was

the only bidder; and it might be inferred that he was bidding in the interest of the estate of which he was administrator. A court of equity would so regard the purchase. As it was his duty to protect and advance the interest of the distributees and creditors, his purchase would be regarded as for their benefit. His disclaimer of such intention merely calls in question the propriety of his instigating the sale, when neither the trustee or *cestui que trust* desired it.

The Circuit Court ordered a re-sale by Hook, the trustee, in the deed of trust. As the testimony shows a depreciation in the value of the land since the purchase, the decree may result unfavorably to plaintiff.

But as no objections are made here, we will affirm the judgment and remand the case for a new order, the time for the re-sale having elapsed. The other judges concur.



**AMOS J. STILLWELL, Plaintiff in Error, vs. JAMES CRAIG, et al.,
Defendants in Error.**

1. *Practice, civil—Jurisdiction—Residence of parties—Hannibal Court of Common Pleas.*—The provision of the Practice Act, that "when there are several defendants and they reside in different counties, the suit may be brought in any such county," (Wagn. Stat., 1005, § 1), applies to the Hannibal Court of Common Pleas, if one or more of the defendants reside in Miller or Mason township, Marion county.
2. *Promissory note—Negotiability—Contracts.*—A note expressed to be "for value received in certificate of stock No. 650, for 10 shares of the capital stock of the State Insurance Company," and payable to the order of the treasurer, "in instalments not to exceed ten per cent. on each share, at thirty days' notice of call from the Board of directors," is a negotiable promissory note within the statutory definition.
3. *Corporation—Promissory note—Trust—Capital stock.—Quære,* whether a corporation can make a valid transfer of such a note, when held by it as part of a trust fund representing its capital stock?

Error to Hannibal Court of Common Pleas.

Henderson & Shields, for Plaintiff in Error.

I. The note sued upon possesses all the requisites of a negotiable promissory note, viz: 1st. Certainty as to the payee; it is payable to the order of the treasurer of the company. 2d. Certainty as to the payer; the defendants are to make the payment. 3d. Certainty of amount; the actual amount here is stated in the note as \$800, payable in instalments. 4th. Certainty as to time of payment; this is also fixed thirty days after notice of call or demand of each instalment. (Clayton vs. Gosling, 5 B. and C., 360; 1 Par. N. and B., p. 39, § 4; Cota vs. Buck, 7 Met., 588, 589; 1 Par. N. and B., ch. 3, p. 41; Goshen Turnpike Co. vs. Hurtin, 9 Johns., 217; Washington County Mut. Life Ins. Co. vs. Miller, 26 Ver., 77; Dutcher's Cotton Manf. Co. vs. Davis, 14 Johns., 238, 244.) 5th Certainty as to the fact of payment. (1 Par. N. and B., ch. 3, p. 30; 2 Bouvier Dic. Title Prom. Note.)

II. Now if this is a promissory note at all, it is a negotiable promissory note, because made so by our statute. (Wagn. Stat. 1872., p. 216, § 15.)

III. Section 1, Wagn. Stat., (1872) p. 1005, provides that "where there are several defendants, and they reside in different counties, suit may be brought in any such county," &c. Sec. 12 Wagn. Stat. (1872.) p. 1008, provides that "where there are several defendants residing in different counties, a separate summons shall be issued to each county, including all the defendants therein," &c. (See also Holland vs. Hunter, 15 Mo., 375.)

IV. In all respects the Hannibal Court of Common Pleas has full and complete jurisdiction of all cases within the townships of Mason and Miller, as the Circuit Courts have within counties. The only exception is the one mentioned in the 3d section. "No person living in the county of Marion and not in the townships of Mason and Miller, could be sued in said court," "except where part of the defendants residing in the county, live inside the townships and part outside, when the suit may be brought in either court." (Sess. Acts 1868, p. 256.) It will be seen that this exception extends only to the county of Marion, and the Marion Circuit Court.

Stillwell v. Craig, et al.

J. H. Chandler and James Carr, for Defendants in Error.

I. The instrument sued on, as set forth in the petition, is a non-negotiable instrument; it was an obligation to pay certain moneys, upon contingencies not expressed in said instrument; it was an obligation which is not only not negotiable by its terms, but was an asset constituting a part of the trust fund held by said State Insurance Company of Missouri, and could only be collected to satisfy losses of the company, and could in no event be transferred by the company to any third party; hence the plaintiff below showed upon the face of his complaint that he had no right to recover.

II. This instrument is not only non-negotiable, but it is not a promissory note. It lacks all the essential elements of negotiable paper. It is contingent, as to whether any part of the amount shall be paid, upon their being losses and expenses of the company; and upon the further contingency of the cash premiums and deposit notes being insufficient to pay losses if they occur; and as to the amount it is contingent, as the par value of the shares does not appear from the face of the instrument sued on. It purports to be for ten shares and the aggregate amount is \$800; when the amount of each share is ascertained, then the call should not exceed 10 per cent. thereon, it may be less. It is contingent as to the time when it should become due; it being provided in the charter that the "note is given for the better security of the policy holders * * * *"; and further, that it should be liable for losses and expenses of the company whenever the cash premiums and deposit notes are insufficient to pay the same," it follows that the contingency of losses must occur, and the contingency of the insufficiency of the cash premiums and deposit notes. The charter is as much a part of the note as if it were written out in the body of it, (31 Barb., 177). A promissory note must be certain as to time of payment. (1 Pars. N. and B., 38.) It must also be certain as to amount. (*Id.*, 37.) A contract to pay money on a contingency, is not a promissory note. (Edw. Bills, pp. 140, 141.) No recovery can be

had on a note payable on assessments by the directors for losses, without showing that the losses have occurred, in addition to the call of the directors. (*Pacific Mutual Ins. Co. vs. Guse*, 49 Mo., 329; 19 Iowa, 502.) Unless the instrument sued on be negotiable, the parties defendant were improperly joined, and the court had no jurisdiction of the parties from Buchanan county, Craig, Garth and Gilkey, it being necessary to sue the obligor or maker before suing assignor; both cannot be sued on non-negotiable instrument. (1 Wagn. Stat., [1872] p. 270, § 8; 23 Mo., 405.)

III. The plaintiff does not claim to be a policy holder, nor to have any interest in the notes as such. The instrument sued on constitutes a part of a trust fund created by the charter to indemnify policy holders against loss, for the 5th section of the charter laws of 1869, authorizing the company to make these contracts, declares that they are for the better security of the policy holders. (Sess. Acts 1869, p. 163, § 5.)

IV. The stock notes, if so called, are a trust fund, and can in no event be transferred by the company to individuals. The company can only sue to satisfy losses, and then only for the *pro rata* part owed by the party sued. (*Sawyer vs. Hoog*, Assignee Ins. Co., Cent. Law Jour., Jan. 22, 1874, p. 43; *Wood vs. Dummer*, 8 Bankr. Reg., 337; 3 Mason, 305; 19 Johns., 456; 15 How., 504; 17 Wal., 610; 19 Iowa, 582.)

V. The court had no jurisdiction under the law establishing it. (See Laws, 1868, p. 256.) It is a court of limited jurisdiction and confined to Mason and Miller townships, save in a solitary exception, when parties may be brought in from the county of Marion outside of said townships. By fixing this exception all others are excluded, and a party residing in Buchanan county cannot be joined in a suit in said court with a defendant residing in said township. Its jurisdiction extends only so far as the law confers it, no general jurisdiction being bestowed upon it by the constitution, as there is upon the Circuit Court. It is an "inferior tribunal," and as such all presumptions are against it. (51 Mo., 296.)

LEWIS, Judge, delivered the opinion of the court.

Suit was instituted in the Hannibal Court of Common Pleas on a note for \$800, given by the defendants Craig, Garth and Gilkey to defendant, The State Insurance Company of Missouri, and by the latter indorsed and delivered for value to the plaintiff. The note was expressed to be "for value received in certificate of stock No. 650, for 10 shares of the capital stock of the said State Insurance Company of the State of Missouri," and payable to the order of the Treasurer "in instalments not to exceed ten per cent. on each share at thirty days notice of call from the Board of Directors."

Process was served on the Insurance Company in Mason township, Marion county, and on the other defendants in Buchanan county, where they resided.

The defendants, Craig, Garth and Gilkey, after an ineffectual motion to quash the sheriff's return as to them, and a "plea to the jurisdiction" which was stricken out, demurred to the petition on the following grounds: "1. Because the court has no jurisdiction of the persons of the defendants Craig, Garth and Gilkey, or either of them. 2. Because there is a defect of parties defendant, and there are two causes of action improperly joined in this action; one cause of action against the State Insurance Company alone, and one against the defendants Craig, Garth and Gilkey alone. 3. Because the defendant, The State Insurance Company of Missouri, is improperly joined, in this action, with the defendants Craig, Garth and Gilkey."

This demurrer was sustained, and judgment was rendered for the defendants. The sustaining of the demurrer is the only matter for revision here, which appears in the record.

The second section of the act of March 25th, 1868, relating to the Hannibal Court of Common Pleas, gives to that court "within the limits of Mason and Miller townships, in the county of Marion, in this State, exclusive original jurisdiction in all civil actions, both in law and equity." The third section is as follows: "Section 3. No person residing within the limits of Marion county, and beyond the limits of Mason and

Miller townships shall be sued in said Hannibal Court of Common Pleas; nor shall any person residing within the limits of said townships be sued in the Circuit Court for the county of Marion, except in cases where there are more defendants than one in the county of Marion, some of whom remain within and some of whom reside without the limits of Mason and Miller townships; in which event suit may be brought either in the said Hannibal Court of Common Pleas, or in the Circuit Court for Marion county, except as hereinafter provided."

The defendants contend that under these provisions, a defendant residing and found outside of Marion county cannot be sued in the Hannibal Court of Common Pleas, under any circumstances; that though, where there are several defendants, some may live within and some without the townships named, yet all must be residents of Marion county, or there will be no jurisdiction. Such a construction is inadmissible. The Practice Act provides (Wagn. Stat., p. 1005, § 1), that "when there are several defendants and they reside in different counties, the suit may be brought in any such county." A plaintiff would be deprived of all benefit of this provision, in any case like the present, if we adopt the interpretation claimed. If, under the first clause in the third section, he could not sue in the Common Pleas, it is equally true that the second would prohibit his suing in the Circuit Court. So that, in case of one defendant living in Mason or Miller township, and another in a different county, no suit could be brought in Marion county at all. The statute intends no such hindrance of justice. By admitting the jurisdiction, we give effect to the Practice Act without violating any express prohibition in the Common Pleas Law, and this is the only possible way to do so. We thus harmonize the two provisions and obey one of the first canons of interpretation.

The 8th section of the Common Pleas Act fully confirms this view, in directing that "the practice, process and proceedings in said Hannibal Court of Common Pleas shall be the same in all respects as is or may be provided by law for

the government of Circuit Courts of this State, &c." The act in all its purport and intents, places the court upon the same footing within its territorial limits, as that of the Circuit Courts in their respective counties.

The second and third grounds of demurrer introduced a discussion of the character of the instrument sued on. If it is not a negotiable promissory note, the action is improperly brought against makers and assignors together. But if it is such, there is no misjoinder of parties or of causes of action. Our statutory requisites for negotiable paper are fully met in this instrument. If it is a promissory note at all, it is "for the payment of money to the payee therein named," and is "expressed to be for value received." But the defendants insist that it lacks in two particulars, the certainty essential to make it a promissory note, viz: As to amount, and as to time of payment. The amount must, it is true, appear with absolute certainty, and cannot be left to depend on unsettled contingencies. The old maxim, "*id certum est, quod certum reddi potest*," is to be excluded from consideration. But no difficulty is apparent here. The sum which the promissors are to pay is \$800, neither more nor less.

As to time of payment, the law is less exacting. The maxim referred to is admissible. Contingencies in this particular must be exceedingly remote, in order to vitiate the paper for negotiable capacity. In *Washington County Mut. Ins. Co. vs. Miller*, (26 Vt., 77,) a note for twenty-one dollars, payable "in such portions and at such time or times as the said company may, agreeably to their act of incorporation, require," was held to be a promissory note for the sum specified, so as to determine a question of jurisdiction; but a doubt was expressed whether it would be such in a commercial sense. The doubt, however, as it seems to me, is not justified by the reasoning of the opinion, or by the authorities which it cites.

In *President, Directors, &c. vs. Hurin*, (9 Johns., 217,) a similar instrument was held to be a good promissory note, as being "payable in money, and payable absolutely, and not

depending on any contingency." In the element of certainty as to time of payment, I can perceive no difference in principle between such a note and one payable on demand. Hence, if the note under consideration be transferable at all, I have no hesitation in saying that it is negotiable, at least to the extent of authorizing a suit jointly against makers and indorser.

But a more serious question is suggested, which counsel have argued with much ability, and which is yet really not comprehended in this record. Had the Insurance Company lawful authority, under its charter, to negotiate or assign the note at all? The demurrer does not touch this inquiry. It is a question not of jurisdiction, or of misjoinder, but of a right of action in the plaintiff. If the corporation had no power to transfer the note, the plaintiff here could not maintain an action on it in any court or by any form of petition.

The demurrer does not object that the petition fails to state facts sufficient to constitute a cause of action; nor yet, that there is any defect of a party plaintiff. We might nevertheless assume that, as the petition now appears, the plaintiff has no standing in court, for want of authority in the corporation to assign to a stranger a note which it holds as part of the trust fund representing its capital stock. But, as this point was not reached in the court below, and the error, if any, is against the successful party, we think it best not to make a case outside of the record as it stands. If there are any special facts or considerations by which the plaintiff may establish a right to sue as indorsee in this particular case, he should be allowed an opportunity to use them. The jurisdiction over the parties being unquestionable, and there being no misjoinder, the court below erred in sustaining the demurrer.

The judgment is therefore reversed, and the cause remanded. Judge Wagner absent; the other judges concur.

 Kirkpatrick v. Downing.

THOMAS KIRKPATRICK, Respondent, *vs.* WILLIAM G. DOWNING,
Appellant.

1. *Contracts—Sales of land—Rescission of—Vendee cannot be held liable for rent.*—One who enters upon land as a vendee cannot, upon a subsequent rescission or breaking up of the contract of sale, be made liable for the rent of the land as a tenant. He is only liable to the extent of the benefit actually derived from the use of the land, in ascertaining which he may be allowed for all outlays in improvements.
2. *Contracts—Sale of lands—Rescission of—Measure of damages to vendee.*—Where the vendor in a contract for the sale of land, knew at the time the contract was entered into that he had no title, or if the sale goes off because he changes his mind, or because he neglects to take the proper steps to put the purchaser in possession, the purchaser may in an action for breach of such contract, recover, beyond his expenses, damages for the loss of his bargain; and the measure of damages is the value of the land, at the time of the breach. Where there is no evidence given, showing any change in the situation, the consideration paid and interest will be taken as the correct value of the land; but when there is evidence given, showing a change in the value of the land, its value at the time the breach occurred and when the conveyance ought to be made will furnish the standard of damages.)

Appeal from Knox Circuit Court.

Glover & Shepley and J. G. Blair, for Appellant.

I. The rule which makes a vendor liable for the value of the land he agreed to convey, at the time he ought to have conveyed, and for no more, is equal and just.

This is the measure of damages applicable to the case. The consequence is that when the vendor refuses to convey, the vendee not having paid the purchase money, the vendee is entitled to the full value of the premises on the day of the breach of contract minus the purchase money, remaining unpaid. If the land is not equal in value to the residue of the purchase money, the vendee is not damaged. This rule is established by the best authorities. (*Shepperd vs. Hampton*, 3 Wheat., 260.) The same principle is applicable to land as to personal property. (*Hopkins vs. Lee*, 5 Wheat., 109.) The overwhelming weight of authority is in support of the doctrine, whether the thing to be conveyed be lands or chattels. (*Loomis vs. Wathams*, 8 Gray, 557; *Lawrence vs. Chase*, 54 Me., 196; *Old Colony, etc. vs. Evans*, 6 Gray,

Kirkpatrick v. Downing.

25; Cox vs. Henry, 32 Pa. St., 18; Gale vs. Dean, 20 Ill., 320; Letcher vs. Woodson, 1 Brock., 212; Warren vs. Wheeler, 21 Me., 484; Buckmaster vs. Grundy, 1 Scam., 310; McKee vs. Brander, 2 Scam., 339; Brenkerhoff vs. Phelps, 43 Barb., 471; Conger vs. Weaver, 24 Barb., 100; S. C., 20 N. Y., 140; Hill vs. Hobart, 16 Me., 169; Whiteside vs. Jennings, 19 Ala., 784; Nichols vs. Freeman, 11 Ired., 99; Koeltz vs. Bleckman, 46 Mo., 320.)

II. The rule adopted by some of our courts, allowing the vendee to recover amount paid with interest, is based upon the idea that the vendee having paid all he contracted to pay is entitled to recover all he contracted to receive. The principle of that rule however has never been extended, as we can see, so far as to allow vendee to recover all paid, when he has not paid all he contracted to pay, and where the land has depreciated in value. In such cases the rule of measuring damages, laid down by the Supreme Court, (S. Carolina, 11 Ired., 99, and Sedgwick on D., 6 Ed. side page 190 to p. 221,) that the difference between the value of the land at the breach and the amount of the purchase money remaining unpaid, is the only true and equitable rule, and being analagous to this case should govern it. This is based upon the uniform principle that a man should only recover actual damages sustained, in the absence of fraud. (6 Sedg., Meas. Dam., 174, 229.)

G. F. Ballingal, for Respondent.

I. Plaintiff was in possession of the land as purchaser of defendant, and the relation of landlord and tenant, could not be made to exist between them; (Coffman vs. Huck, 19 Mo., 435; Griffith vs. Depenstal, 3 A. K. Marshall, 1058,) and the charge for rent and profit could not be sustained.

II. Time was not made of the essence of the contract, and if defendant had disabled himself from conveying to plaintiff, by the sale to Baker, then he was at fault and plaintiff was not limited to the penalty in the bond and could waive the same and sue for damages. (Foley vs. McKeegan, 4 Iowa, 1; Sween vs. Steele, 5 Iowa, 352.)

III. If there was no bad faith on the part of defendant in selling the land to another person, and if there is no cancellation, then the measure of damages would be the purchase money and interest; and it was immaterial what the value of the land was at the time plaintiff purchased of defendant, or the improvements thereon, or the improvements at the time defendant sold to Baker, or the value at the time defendant sold to Baker, or the value of the land, or the improvements on said land to Baker by defendant, or whether the same had increased or decreased in value since the sale to plaintiff, and up to the sale to Baker. And if there is bad faith, then the vendee can recover not only the purchase money and interest, but substantial damages. (*Coffman vs. Huck*, 19 Mo., 435; *Foley vs. McKeegan*, 4 Iowa, 1; *Werting vs. Nisely*, 13 Penn., 650; *Clark vs. Parr*, 14 Ohio, 118; *Pena vs. Duvall*, 9 B. Mon., 48; *Shaw vs. Wilkins*, 8 Humph., 647; *Peters vs. McKeon*, 4 Denio, 546; *Kinney vs. Watts*, 14 Wend., 38; *Pitcher vs. Livingston*, 4 John., 1; *Fletcher vs. Button*, 6 Barb., 646; *Bitter vs. Brough*, 1 Jones, Pa., 127; *Griffith vs. Depew*, 3 A. K. Marshall, 1058; 45 Mo., 404; *Langford vs. Caldwell*, 48 Mo., 508; *Goff vs. Hanks*, 5 J. J. Marshall; *Davis vs. Lewis*, 47 Bibb., 457; *Breckinridge vs. Hake*, 4 Bibb., 272; *Combs vs. Harlton*, 2 Dana, 464; *Lowry vs. Cox's admr. and heirs*, 2 Dana, 469; *Brandt vs. Foster*, 5 Iowa, 287; *Patrick vs. Roach*, 21 Texas, 251; *Sween vs. Steele*, 5 Iowa, 352.)

WAGNER, Judge delivered the opinion of the court.

The plaintiff, Kirkpatrick, filed his petition, in which he stated that on the 25th of August, 1857, the defendant, Downing, was owner in fee of 160 acres of land, which was therein described; and that on the same day Downing sold the same to Kirkpatrick, for the sum of \$3,200, and executed to him a title bond therefor; that Kirkpatrick paid in money and property \$500 at the time, and gave his five several promissory notes for the balance, each for the sum of \$540, and payable respectively, in one, two, three, four and five years; that, by the terms of the bond, Downing was to make a deed to plain-

Kirkpatrick v. Downing.

tiff upon the payment of the last note; that Kirkpatrick took possession of the land, and on March 1, 1859, with the consent of Downing, he sold 40 acres of the land to Charles Hughes, for \$1,200, which amount was paid by Hughes to Downing, and which was to be credited on the indebtedness of the plaintiff; that plaintiff occupied and cultivated the land to sometime in 1865, and paid \$80 taxes on it, and made lasting and valuable improvements thereon, costing \$1,000, and cleared thirty-five acres of land, which was worth \$700, and paid the promissory notes in full, and demanded of Downing a deed for the land, which he refused to make; and that he sold and conveyed the land to one Baker; that in 1864, whilst plaintiff was absent from home, Downing procured fraudulently from plaintiff's son a surrender of the title bond, the son having no authority to give it up. The petition then prayed judgment for \$1,780, the value of the improvements made and amount of taxes paid, and also \$3,200 purchase money, with interest thereon.

In substance the answer of Downing stated that he was the owner of the lands in fee simple; sold them to plaintiff at the price and upon the terms stated in the petition; and that he bound himself, upon payment in full of the notes, to convey the title to the plaintiff. The answer denied the payment of the notes in full, and averred that, independent of the \$1,200 paid by Hughes, plaintiff only paid \$920; and that plaintiff and defendant agreed that the forty acres sold to Hughes, should be conveyed by defendant to Hughes. It was admitted that plaintiff made some improvements, but it was denied that he ever made as much as was alleged.

There was a denial of any fraudulent procurement of the surrender of the title bond. But it was alleged that plaintiff left home in 1861, his family residing on the land; and that they continued on it till 1865, and that plaintiff's wife was his agent during his absence; that in 1864 plaintiff's family were committing waste on the land, impairing defendant's security for the purchase money, and that defendant remonstrated with her about it, and that she said that she was au-

thorized to rescind the contract, and produced a letter to that effect from her husband ; and that the contract was then and there cancelled ; and that the two remaining notes which were due, amounting, with interest, to about \$1,900, were delivered to her by the defendant ; that these notes, with the interest, were greater in amount than the value of the land ; and that in pursuance of this cancellation, plaintiff's family left the land.

That afterwards, in 1865, defendant sold the whole 160 acres for \$1,600, the full value of it at that time ; and at the same time the 120 acres were not worth more than \$900; that plaintiff and his family were in possession of the land from 1857 to 1865, cultivating the same and enjoying the crops, the use of the land being of the annual value of \$400, which defendant prayed to have recouped ; that, while in possession of the land, plaintiff committed waste, cut down and carried away timber to the value of \$500, which was also asked to be recouped.

All that part of the answer in reference to a sale of the land to another person for its full value, and the annual value of the rental of the land, and the waste committed by the plaintiff whilst in possession, was stricken out. The plaintiff then filed a replication to the new matter set up in the answer, and the cause was tried before the court and a jury, and a verdict was rendered for the plaintiff for \$2,076.60. It is unnecessary to notice any of the points made in relation to the admission or exclusion of evidence, as we have been unable to perceive any substantial error in the rulings of the court in that respect.

The evidence was conflicting in regard to the authority of plaintiff's wife to deliver up the title bond and rescind the contract, and the jury by their verdict, evidently found that she possessed no such authority. That was a matter for them to determine on the testimony, and with their verdict we have no right to interfere. That part of the answer asking for a recoupment for the value of the rent and damages was rightfully stricken out. The relation of landlord and tenant did not exist in this case, and that is the only relation upon

Kirkpatrick v. Downing.

which the defense would have been available. The case of *Coffman vs. Huck*, (19 Mo., 435) is a direct authority for this proposition, and it was there held that a party who enters upon land as a vendee cannot, upon a subsequent rescission or breaking up of the contract of sale, be made liable for the rent of the land as a tenant: He is only liable to the extent of the benefit actually derived by him from the use of the land, in ascertaining which he may be allowed for all outlays in improvements.

But the only question of any real importance in this case, and upon which the decision must ultimately turn, is that in regard to the measure of damages.

This is the only question that was presented with any prominence in the instructions of the court, and this will now be considered.

For the plaintiff the court gave the following declarations: "The jury are instructed that unless they believe from the evidence, that the wife of the plaintiff was authorized by him to cancel and rescind the written contract for the conveyance of the land from defendant to plaintiff, and surrender the bond and receive the notes in pursuance thereof; and that said wife did cancel and rescind said contract and deliver up said bond in pursuance of said authority given said wife by said plaintiff, they will find for plaintiff and assess his damages at the amount of purchase money paid by plaintiff, with six per cent. interest thereon from the time the same was so paid until the present time."

At the instance of the defendant an instruction was given, that if the wife of the plaintiff was authorized to cancel or rescind the contract of sale, then the verdict should be for the defendant, but the court refused at his request, to declare the law to be: "That if the jury shall believe from the evidence, that the defendant acted in good faith in the sale of the land in question to Baker, and not with intent to injure or defraud plaintiff, then the measure of damages in the case is the actual damages sustained by plaintiff, and if the jury shall further believe from the evidence, that at the time de-

fendant sold said land to said Baker, plaintiff was owing defendant therefor more than said land was worth in cash in the market, then the jury should allow nominal damages only."

Upon the question of damages in cases like this, the authorities are conflicting and inharmonious. That there are many cases of the very highest respectability sustaining the view taken by the court below is unquestioned. In conformity with the decisions in both England and America, the courts in this State have held that the measure of damages on a breach of covenant of seizin is limited by the consideration money and interest. (*Dickson vs. Desire*, 23 Mo., 166; *Tong vs. Matthews*, *Id.*, 437.) The covenant of seizin is broken as soon as it is made. If at the time of the execution of the deed the grantor does not own the land, the covenant is broken immediately, and the rule for assessing the damages arising on this breach is based upon the principle that, no land having passed by the vendor's deed to the purchaser, the purchaser has lost no land by the breach of the covenant, he has lost only the consideration he paid.

And many cases, as before remarked, have held this rule equally applicable to the case of a sale of land, when the vendor for any reason refuses to carry out his agreement and convey the title. As abundant authorities may be found, both for and against this rule, it is best to examine the question in the light of reason and determine if possible, what line of adjudication will most likely be promotive of the ends of justice. Mr. Sedgwick well remarks in his treatise on the Measure of Damages, that although courts have felt themselves bound in some instances, as to real covenants, to adopt arbitrary rules, still the constant effort is to give compensation for what is actually lost, not to allow remuneration for a mere technical breach of agreement, but to make the measure of damages correspond with the real injury sustained and not to permit an action where no loss has been suffered. (*Sedg. Meas. Dam.*, 6th Ed., 194.)

Kirkpatrick v. Downing.

A difference has been taken in some of the cases in regard to the good or bad faith of the vendor, in failing to comply with his agreement, as affecting the amount of damages, some holding that where he is guilty of fraud, or has acted dishonestly, substantial damages may be awarded to the purchaser, whilst others take the opposite view, and declare that the motives which actuated the seller can have no influence on the principle involved, and that the damages in either event will be the same. In *Flurean vs. Thornhill*, (2 W. Bl., 1078) it was held that contracts for the sale of real estate are on the condition, always implied if not expressed, that the seller has a good title, and if without fraud he fails to convey by such title, the vendee is not entitled to damages for the loss of his bargain. But in the still later and very recent case of *Engel vs. Fitch*, (L. R., 3 Q. B., 314) this question was subjected to a very full and elaborate discussion in the Queen's Bench. It appeared in this case, that the defendants, mortgagees of the lease of a house, sold it by auction to the plaintiff, the particulars of the sale stating that the possession would be given on completion of the purchase. The plaintiff re-sold it at an advance to a person who wanted the house for occupation. Upon an investigation of the title, it was found satisfactory, but on the plaintiff requiring possession before completing the purchase, the mortgagor was found to be in possession, and refused to give it up. The defendants could have ousted him by ejectment, but they refused to complete the sale on the ground of expense. On this the plaintiff brought an action for breach of the contract of sale, and it was held, that, as the breach of contract arose not from inability of the defendants to make a good title, but from their refusal to take the necessary steps to give the plaintiff possession pursuant to their contract, the plaintiff could recover not only the deposit and the expense of investigating the title, but also damages for the loss of his bargain, and that the measure of damages was the profit which it was shown he could have made on a re-sale. The cases bearing on the subject were all thoroughly reviewed, and the above result arrived at.

The case of *Engel vs. Fitch* was affirmed in Exchequer Chamber, (L. R. 4 Q. B., 659) with a slight difference in the mode of stating the measure of damages, which was held to be the difference between the contract price and the value at the time of the breach of the contract, the profit which it was shown the plaintiff could have made on a re-sale being the evidence of this enhanced value and its amount. In delivering the judgment, Kelly, Ch. B., said: "No case has been cited in which the purchaser of real property has been held disentitled to recover damages like the present, except in the case of *Flurean vs. Thornhill*, and the cases which followed it, and upon the one ground of the vendor's inability to make out a title; and there is no authority to show that when the breach of contract has been on any other ground, any other rule as to damages applies in contracts as to the sale of real property than that which prevails in the ordinary case of a breach of contract." This decision is highly approved by Mr. Dart, and in commenting upon it (2 Dart Vend. and P., 4 Eng. Ed., 873-4) he says; "This decision, though scarcely reconcilable with some of the earlier authorities, has placed the rule on a clear and intelligible footing, and has excluded from its operation the case of a vendor selling *mala fide*, or entering into a merely speculative contract for sale." This rule, then, is clearly deducible from the English authorities, if the vendor knew, at the time the contract was entered into, that he had no title, or if the sale goes off because he changes his mind, or because he neglects to take the necessary steps for putting the purchaser into possession, the purchaser may, in an action for breach of such contract, recover, beyond his expenses, damages for the loss of his bargain. (1 Chit. Contracts, 11 Am. Ed., 437.)

Mr. Perkins, in his last edition of *Sugden on Vendors and Purchasers*, in an elaborate note, says that the current of American authority now runs in the same direction. He says: "It has been held that, where the vendor has, in bad faith, agreed to sell land to which he knew he had no title (*McDonnell vs. Dunlap*, Hardin, 41; *Davis vs. Lewis*, 4 Bibb., 456; *Baldwin*

vs. Munn, 2 Wend., 399; McNair vs. Compton, 35 Penn. St., 23; Brinkerhoff vs. Phelps, 24 Barb., 100; S. C. 43 Barb., 469; Drake vs. Baker, 34 N. J., 358; Peters vs. McKeon, 4 Denio, 556; Bush vs. Cole, 28 N. Y., 261); where, having the title at the time of the agreement to convey, he has afterwards disabled himself from conveying by a transfer to a third person (Wilson vs. Spencer, 11 Leigh, 261; Dustin vs. Newcomer, 8 Ohio, 49); where he refuses to convey because the land is greatly enhanced in value (Brinkerhoff vs. Phelps, 24 Barb., 100; S. C. 43 Barb., 469), and also, where having the title at the time he ought to convey according to his agreement, he still refuses to convey, in all these cases, in a suit at law for a breach of the agreement to convey, the vendee is entitled to recover such sum as will indemnify him from the actual and direct loss sustained by the non-performance of the agreement, which would generally be the difference between the contract price and the enhanced value of the land when the conveyance should have been made." (Western Railway vs. Babcock, 6 Met., 358; Pringle vs. Spaulding, 53 Barb., 17.)

So in Michigan, the measure of damages for a willful breach of a contract to sell and convey a lot of land, was held to be the difference between the actual value of the land at the time of the breach and the sum agreed to be paid. (Allen vs. Atkinson, 21 Mich., 353.) And again in the case of Hammond vs. Honnin, (Id., 374) the court regards it as settled, that while the ordinary measure of damages for breaking a covenant to sell real estate continues to be the consideration money and interest, with perhaps also the cost of investigating the title; yet, that where a party contracts to sell, knowing he cannot make a title, or having a title, refuses to convey, or disables himself from conveying, or otherwise acts in bad faith, the vendor is remitted to his general liability. The rule is, then, the same in relation to real as to personal property, and the measure of damages is the value of the land at the time of the breach.

The same rule prevails in the Supreme Court of the United States. In Hopkins vs. Lee, (6 Wheat., 109) the court said:

"The rule is settled in this court, that in an action by the vendee for a breach of contract on the part of the vendor for not delivering the article, the measure of damages is its price at the time of the breach. The price being settled by the contract, which is generally the case, makes no difference, nor ought it to make any; otherwise the vendor, if the article has risen in value, would always have it in his power to discharge himself from his contract, and put the enhanced value in his own pocket; nor can it make any difference in principle whether the contract be for real or personal property, if the lands, as is the case here, have not been improved or built on. In both cases the vendee is entitled to have the thing agreed for at the contract price, and to sell it himself at its increased value. If it be withheld, the owner ought to make good to him the difference."

So in *Maine*, *Hill vs. Hobart* (16 Me., 164), it was decided that in debt for breach of a bond conditioned for the conveyance of land, the measure of damages was the value of the land at the time the conveyance should have been made. The court says, when the vendee proceeds at law, he is entitled to a complete indemnity and no more. By a performance he would have received the land, and not receiving that if he obtains the value at the time, that is the exact measure of his loss. And the same doctrine is announced in many other cases. (*Warren vs. Wheeler*, 21 Me., 484; *Lawrence vs. Chase*, 54 Me., 196; *King vs. Brown*, 2 Hill, 485; *Boardman vs. Keeler*, 21 Vt., 84; *Bryant vs. Hambrick*, 9 Ga., 133; *Barnham vs. Nichols*, 3 R. I., 187; *Burr vs. Todd*, 41 Penn. St., 206; *Shaw vs. Wilkins*, 8 Humph., 647; *McKee vs. Brandon*, 2 Scam., 399; *Hopkins vs. Yowell*, 5 Yerg., 305; *Cannell vs. McLean*, 6 Harr. and J., 297; *Marshall vs. Harney*, 9 Gill., 251; *Whiteside vs. Jennings*, 19 Ala., 784.)

The same principle is applied where the vendee has not actually tendered performance, or has not made an available tender, but, in consequence of the acts of the vendor, or otherwise, is still entitled to maintain a suit for breach of contract on the part of the vendor in not conveying. In such

Kirkpatrick v. Downing.

a case the measure of damages would be the same, namely; the difference between the contract price and the value of the land at the time of the breach. (*Lee vs. Russell*, 8 Ired., 826; *Nichols vs. Freeman*, 11 Ired., 99; *Goodwin vs. Francis*, L. R., 5 C. P., 295.)

The rule must be reciprocal; where the property has enhanced in value the purchaser gets the benefit of the enhancement, so where a depreciation has taken place he must submit to a corresponding loss. In both cases he obtains the true measure of damages, full compensation for the loss sustained. Thus, in *Nichols vs. Freeman*, the plaintiff purchased a lot of land for \$8,000, and paid the greater part of the purchase money. The plaintiff was let into possession, and the defendant executed a bond in the penalty of \$10,000, conditioned to convey upon the payment of the balance of the purchase money. The plaintiff was evicted by the judgment creditors of the defendant, and the property sold by the plaintiff for \$2,500, which was admitted to be the real value of the property at the time. The court refused to allow the plaintiff to recover the amount of the purchase money, as if he had repudiated the contract and sued for money had and received. It was said: "Here the plaintiff seeks to recover compensation; what sum will put him in as good a condition as if the contract had been performed? In this case he would have got property worth \$2,500, but he would have been forced to pay the balance of the purchase money and interest. He has not paid this latter amount, and his damage is the difference between that sum and the value of the property, which, by the case, is agreed to be \$207.80;" and to that sum the redress was limited. So in *Goodwin vs. Francis*, where the purchase money had not been paid, *Bo-ville*, Ch. J. in delivering his opinion, said: "I am not aware of any decision in which it has been held that, where a man having a good title refuses to convey according to contract, he is not liable to compensate the other party for the loss of his bargain, as well as for any expenses he may have actually incurred. The contrary is laid down in *Engel vs. Fitch*, and I do not see that *Sikes vs. Wild* is inconsistent with it, for in

that case there was a failure of the title. I think, therefore, that the defendant is liable for the difference between the contract price and the market value of the estate, and that the price at which it was re-sold is *prima facie* evidence of its market value."

Where there is no evidence given showing any change in the situation, the consideration paid and interest will be taken as the correct value of the land. But where there is evidence given showing a change in the value of the land, the value at the time the breach occurred, and when the conveyance ought to be made, will furnish the standard of damages. This is fair and just for both parties, as they obtain precisely what they are entitled to, and the basis is predicated on actual loss, the full and adequate compensation.

The rule commends itself for its intrinsic justice. It conforms to the varying circumstances of each particular case, and is equitable and just. The arbitrary and unbending rule that the purchase money and interest shall in all cases be taken as the criterion of damages, will, in the majority of instances, do injustice either to the seller or purchaser. No reason is perceived why it should be adhered to and enforced, when one more consistent with equity is found, and which is easily administered. The rule for which we contend is just to both parties. It gives to the purchaser precisely what he has lost in consequence of the breach of contract committed by his vendor, and it makes the latter responsible for the violation of his agreement in the full amount to which he has occasioned injury.

Now, in the present case, the plaintiff still owed a part of the purchase money for the land, but he cannot obtain a conveyance of the land upon the payment of the balance due, because the defendant has disabled himself from conveying, by selling the land to another person. What, then, is the extent of his loss, and what constitutes the measure of his damages? Plainly, the difference between what he owes on the land, and what the land is worth.

Wherefore it follows that the judgment should be reversed and the cause remanded. The other judges concur.

HERMAN TIARKS Respondent, vs. ST. LOUIS & IRON MOUNTAIN
R. R. Co., Appellant.

1. *Railroads—Fences—Killing of stock—Damages—Timber land.*—The 43rd sec. of the Railroad Corporation Law, (Wagn. Stat., 310-11) which requires all railroads "to erect and maintain fences on the sides of the road where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed prairie lands;" requires that in such places, fences shall be erected and maintained on both sides of the road. But the obligation is not extended to timber lands or land from which the timber has been cut, but which is not cultivated. And when stock is killed at such a place the owner is not entitled to double damages. He can only recover single damages, by proceeding under sec. 5 of the Damages Act. (Wagn. Stat., 520.)

Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

I. The case is one where the land at the place of injury was uninclosed and uncultivated timbered, not prairie land. To such a case the statute does not reach; and there was therefore no evidence to sustain the verdict, even for single damages. The 43rd section gives no right of recovery except where the injury happens within inclosed or cultivated fields or uninclosed prairie lands. The case proved comes within neither the letter nor the spirit of the statute.

II. The verdict cannot be sustained under the 5th section of the Damage Act (1 Wagn. Stat., 520) because the verdict is a verdict for damages, whereas the only verdict which the law warrants is a verdict for the value of the thing injured.

III. If we are right in supposing the plaintiff failed to bring his case within the provisions of section 43, then the judgment for double damages was clearly erroneous, for there is no law other than that section which gives the right to double damages. The case of *Hudson vs. The St. Louis, K. C. & N. R. Co.*, (53 Mo., 525,) has no application. No such question arose there as is made here. That was a case which confessedly came within the 43rd section; this most clearly does not.

B. B. Cahoon, for Defendant in Error.

I. The land was in the state of being cleared for cultivation at the point where the cow strayed upon the track and was killed. Under these circumstances the defendant in error was entitled to recover under the statute. (Wagn. Stat., 310-11, § 43.) In construing the statute we are to examine it in the light in which it was enacted, and take into consideration "the whole object which led to its enactment." (Lafferty vs. Han. & St. Joe. R. R. Co., 44 Mo., 294.) The object of the statute is two-fold: 1st—as a public regulation for the safety of passengers and the traveling public, who are exposed to danger and peril in case of collision with stock; and 2nd—for the benefit and protection of owners of stock who are liable to suffer loss and damage, by reason of the stock getting upon the road and being injured or killed for want of a fence on the sides of the road, which would have prevented the stock from straying on the road. (Lafferty vs. Han. & St. Joe. R. R. Co., 44 Mo., 294; Gorman vs. Pac. R. R. Co., 26 Mo., 450.)

II. In this State the owners of cattle incur no responsibility, and are not guilty of any fault or negligence toward others, by turning loose their cattle, unless such cattle trespass upon fields inclosed in the manner prescribed by law. (Gorman vs. Pac. R. R. Co., 26 Mo., 445-6-8-9.) On the other hand, the statute requires corporations to have their fences built at least as soon as they commence running their railroads. (Comings vs. Han. & Cen. Mo. R. R. Co., 43 Mo., 516; Clark vs. Verm. & C. R. R. Co., 28 Verm., 103.)

III. This court, in a recent case, in construing the statute, declares that "the statute requiring railroads to be fenced, does not confine or limit the parts to be fenced to prairie or untimbered land," as is contended for by the plaintiff in error. (Hudson vs. St. L., K. C. & N. R. R. Co., 53 Mo., 539.)

IV. This second instruction was clearly erroneous. (53 Mo., 539). If it was not contemplated that the whole road should be fenced, damages for the value of cattle killed, would not be given, as is done by § 5, Wagn. Stat., 520. Moreover,

if the cow was not killed at any of the points on the road, required by Wagn. Stat., § 43, 310-11, to be fenced, but killed at some other point on the road, then the company would be liable for her value if the road was not fenced, irrespective of the question of negligence; (Wagn. Stat., 520, § 5, and see authorities cited in note 2; *Bigelow vs. N. M. R. R. Co.*, 48 Mo., 520) and in this event the instruction was calculated to mislead the court sitting as a jury, and was properly refused. (*Klamp vs. Rodewalt*, 19 Mo., 449.) Its logic went to the assertion of the proposition, that if the court found the cow was killed, under the state of facts detailed in the first instruction, there could be no recovery at all; this was not the law.

WAGNER, Judge, delivered the opinion of the court.

This case was commenced before a justice of the peace, and was brought for damages for killing plaintiff's cow on defendant's railroad. In the justice's court plaintiff had a judgment, and on an appeal to the Circuit Court there was a trial without a jury and a verdict found for plaintiff for thirty dollars damages, and the court doubled the damages and gave judgment accordingly. The action was commenced under the 43rd section of the railroad corporation law, (1 Wagn. Stat., 310-11) and the only question is, whether under the circumstances of the case the action is maintainable under that section.

The evidence in the case is brief and undisputed; it shows that the cow was killed at a place where the railroad was not fenced. The land at the place was uninclosed and uncultivated and it was not prairie land. It was originally timbered land, but most of the timber had been cut off. There was no evidence, whatever, of any actual negligence or carelessness on the part of the company in running its train when the cow was killed, and this fact was so declared by the court.

The second and fourth instructions offered by the defendant, were refused, and that constitutes the error complained of and furnishes the theory on which the court based its deci-

sion. By the second instruction, the court was requested to declare the law to be: that there was no law that obliged the defendant to fence its railroad at points where the same run through, along, and adjoining timber land or land from which timber had been wholly or partially cut off, but which land had never been inclosed by a fence or cultivated. The fourth instruction was simply a declaration that land covered with timber, or which had once been timbered land, was not prairie within the meaning of the law.

The 43rd section of the railroad corporation law has frequently been before this court, but the point now raised has never been presented or adjudged. The section makes it obligatory upon all railroads in this State to erect and maintain good and substantial fences on the sides of the road where the same passes through, along, or adjoining inclosed or cultivated fields or uninclosed prairie land; and until such fences are erected, the corporation is made liable in double the amount for all damage that is done, by its agents, engines or cars, to all animals on the road.

In *Walther vs. Pac. R. R.* (55 Mo.. 271), it appeared that at the point where the horse was killed, the road adjoined inclosed and cultivated fields on one side, and rough, timbered, and uninclosed lands on the other side, and that the horse got upon the road from the uninclosed side. It was held that the company was liable, and that under a proper construction of the statute it was contemplated that the road should, in such a case, be fenced, not only on the side on which the inclosed field was situated, but on both sides. The statute requires that where the road passes through, along or adjoining inclosed or cultivated fields good and substantial fences shall be erected and maintained on the sides of the road. The same requirement is made where it runs through uninclosed prairie land, and it was obviously designed in these cases, that the road should be fenced on both sides so as to prevent the approach of stock. In the case of *Slattery vs. The St. L., K. C. & N. Rlw.*, (*Id.*, 362,) the same principle was reiterated and it was decided that the company should

fence in the line of their road adjoining all inclosed lands whether timbered or otherwise.

That these cases justly interpret and faithfully carry out the spirit and intention of the law, I have no doubt. The duty of the road is to fence where it passes through, along or adjoining inclosed or cultivated fields. The statute does not merely say on the side of such inclosure or cultivated field, but on the side of the road. No distinction is made. Nor does it make any difference as to the character of the country whether timbered or not. The reason is plain enough. Wooded or timbered land is frequently inclosed for pasturage, and in that event there is both propriety and necessity in compelling the roads to fence, to prevent cattle or animals from getting on the track. But where there is no inclosure or cultivation, then the law confines the duty of fencing to uninclosed prairie lands. There is no mistaking the reason of this. We know that this State is composed largely of prairie lands. They have always been considered as very valuable for grazing. Instead of being under the necessity of keeping their animals inclosed, as is the case in some of the older States, our people have had the advantage of free pasture, and derived large profits from these prairies. The legislature, knowing this, saw that the same reason existed for the erection and maintenance of fences in the prairie country that existed where there were cultivated or inclosed fields, namely, to keep animals off the track, both to preserve them from being hurt, and to render traveling less hazardous. But the timbered land was never regarded as furnishing any inducements, or likely to be used for pasturing purposes, and therefore it was not included in the statutory requisition. But where the timber has been cut off, can the law be made to prevail? The meaning of what is included in the term "prairie land" is too well known and strongly marked, to admit of any such a construction. No one, I apprehend, would ever think of calling a field, which had been cleared of timber, prairie land. The legislative mind was never directed to this view of the subject. The reason, I suppose, why the law

was not made to apply to timber land which was cleared off, was that it was never anticipated in this State that any one would cut the timber off of his land and leave it open for purposes of grazing. The law clearly does not apply to the case, and we have no right to make a new law. The enactment is clear and devoid of any ambiguity and we would not be justified in torturing it into a meaning that was never intended for it. Unless the killing takes place where the statute makes it obligatory on the roads to fence, there can be no double damages.

The 5th section of the Damage Act (1 Wagn. Stat., 520) was designed to furnish an inducement for the roads to fence their track where it was not deemed absolutely necessary to compel them to do so. By that section, if the road is not fenced, and animals are killed at a place where the law does not require fences to be erected, the law raises the inference of negligence, and the corporation will be liable. The owner has only to prove the killing, and the law presumes carelessness; but the liability only extends to the value of the stock killed. We think the plaintiff mistook his remedy. He should have commenced his action under this last section, where the proofs would have entitled him to the value of his cow, but as she was killed at a place where the road was not required to be fenced, he cannot obtain double damages under the 43rd section.

Wherefore the judgment should be reversed and the cause remanded. The other judges concur.

Mason v. St. L. & I. M. R. R. Co.—Shrum v. St. L. & I. M. R. R. Co.

WESTLEY MASON, Respondent, *vs.* THE ST. LOUIS AND IRON
MOUNTAIN RAILROAD COMPANY, Appellant.

Tiarks v. Same, *ante* p. 45 affirmed.

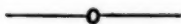
Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

Cahoon, and Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case is in all respects similar to the case of Tiarks vs. The St. Louis and Iron Mountain Railroad *ante* p. 45, and for the reasons therein given, the judgment must be reversed and the cause remanded. The other judges concur.



SAMUEL SHRUM, Respondent, *vs.* THE ST. LOUIS AND IRON
MOUNTAIN RAILROAD Co., Appellant.

Tiarks vs. Same, *ante* p. 45, affirmed.

Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

B. B. Cahoon, and J. B. Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The questions in this case are the same as those presented in Tiarks vs. The St. Louis & Iron Mountain Railroad *ante* p. 45, and for the reasons given in that case, the judgment herein must be reversed and the cause remanded. The other judges concur.

Switzer v. St. L. & I. M. R. R. Co.—Dee v. St. L. & I. M. R. R. Co.

EDWARD SWITZER, Respondent, *vs.* THE ST. LOUIS & IRON
MOUNTAIN RAILROAD CO., Appellant.

Tiarks *vs.* Same, *ante* p. 45, affirmed.

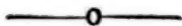
Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

J. B. Duchouquette, and *B. B. Cahoon*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case presents the same questions as those raised in *Tiarks vs. The St. Louis & Iron Mountain Railroad*, *ante* p. 45, affirmed, and for the reasons given therein, the judgment must be reversed and the cause remanded. The other judges concur.



JOHN T. DEE, Respondent, *vs.* THE ST. LOUIS & IRON MOUN-
TAIN RAILROAD CO., Appellant.

Tiarks *vs.* Same, *ante* p. 45, affirmed.

Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

J. B. Duchouquette, and *B. B. Cahoon*, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case is similar to the case of *Tiarks vs. The St. Louis & Iron Mountain Railway*, *ante* p. 45, and for the reasons given therein the judgment must be reversed and the cause remanded. The other judges concur.

Riffey v. St. L. & I. M. R. R. Co.—Grounds v. St. L. & I. M. R. R. Co.

SAMUEL RIFFEY, Respondent, *vs.* THE ST. LOUIS & IRON MOUNTAIN RAILROAD Co., Appellant.

Tiarks *vs.* Same, *ante* p. 45, affirmed.

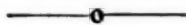
Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

B. B. Cahoon and J. B. Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case is identical with the case of *Tiarks vs. The St. Louis & Iron Mountain Railroad*, *ante* p. 45, and for the reasons given in that case, the judgment must be reversed and the cause remanded. The other judges concur.



MARY GROUNDS, Respondent, *vs.* THE ST. LOUIS & IRON MOUNTAIN RAILROAD Co., Appellant.

Tiarks v. Same, *ante* p. 45, affirmed.

Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

B. B. Cahoon and J. B. Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case is identical with the case of *Tiarks v. The St. Louis & Iron Mountain Railroad*, *ante* p. 45, and in conformity with the decision therein rendered, the judgment must be reversed and the cause remanded. All the judges concur.

Proffett v. St. L. & I. M. R. R. Co.—Stephens v. St. L. & I. M. R. R. Co.

DAVID PROFFETT, Respondent, *vs.* THE ST. LOUIS & IRON MOUNTAIN RAILROAD Co., Appellant.

Buxton *vs.* Same, *post* p. 55, affirmed

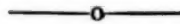
Appeal from St. Francois Circuit Court.

Dryden & Dryden, for Appellant.

B. B. Cahoon and J. B. Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case shows essentially the same facts as the case of Buxton *vs.* The St. Louis & Iron Mountain Railway, *post* p. 55, and was decided in the court below in the same way. For the reasons given in that case, the judgment must be reversed and the cause remanded. The other judges concur.



GEORGE M. STEPHENS, Respondent, *vs.* THE ST. LOUIS & IRON MOUNTAIN RAILROAD Co., Appellant.

Tiarks *vs.* Same, *ante* p. 45, affirmed.

Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

B. B. Cahoon and J. B. Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case originated before a justice of the peace, and in its facts is entirely similar to the case of Tiarks *vs.* the same defendants, *ante* p. 45, and for the reasons given in that case, the judgment must be reversed and the cause remanded. The other judges concur.

Buxton v. St. L. & I. M. R. R. Co.

JAMES BUXTON, Respondent, vs. THE ST. LOUIS & IRON MOUNTAIN RAILROAD Co., Appellant.

Tiarks vs. Same, *ante* p. 45, affirmed.

Appeal from Madison Circuit Court.

Dryden & Dryden, for Appellant.

Cahoon and Duchouquette, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was an action for double damages against the defendant, under the 43rd section of the railroad corporation law, (Wagn. Stat., 310).

The petition alleged that defendant, by its engine, injured plaintiff's ox on its railroad at a place where the same, unfenced, ran through uninclosed prairie land.

The cause was tried before the court sitting as a jury, and the only evidence in the case as to the character of the country through which the road ran where the injury happened, was given by the plaintiff and his son. They both testified that the road was not fenced where the killing took place; and that at that point the land was timbered land, but that it had been stripped of its timber.

At the instance of the plaintiff the court gave one declaration of law, to the effect, that if the defendant, by its engine, ran over and killed the ox of the plaintiff, while it was on the track of the road at a point where the same was not inclosed by a lawful fence, and where the road passed through uninclosed prairie lands, and that the ox strayed upon the track by reason of the want of such fence, then it was by the carelessness and negligence of the company, and plaintiff was entitled to recover; and that "uninclosed prairie lands," as used by the statute, meant and embraced woodlands.

The court refused defendant's instructions, to the effect, that land covered with timber was not prairie land, and that land once covered with timber, but from which the timber had been cut off or stripped, was not prairie land. There was then a finding of the damages, which were doubled, and judgment accordingly.

 McQuie, et al. v. Peay, et al.

Manifestly there was error in giving plaintiff's instructions. There was no evidence in the case on which to base the hypothesis that the point where the killing was done was uninclosed prairie land, but the plaintiff's own testimony was directly to the contrary, and showed that the land was timbered land. Then the further declaration is made, that prairie land and woodland are synonymous, and mean one and the same thing.

We cannot admit the correctness of this view. This question, however, has been recently discussed in the case of Tiarks against this defendant, and it is only necessary to refer to the opinion in that case, which must govern and control this.

With the concurrence of the other judges, the judgment will be reversed and the cause remanded.

— o —

WILLIAM A. McQUIE, *et al.*, Respondents, *vs.* GEORGE W. PEAY, *et al.*, Appellants.

1. *Deeds of trust—Failure to name trustee—Effect of deed in equity.*—The failure to insert the name of the trustee in a deed of trust, when in other respects the instrument is complete, although at law it makes the deed inoperative, does not wholly vitiate it. The deed will nevertheless be regarded as an equitable mortgage, and held to create a lien for the benefit of the creditor, which may be enforced in equity. And the assignee of the note will be subrogated to all the rights and equities of his assignor.
2. *Conveyances in blank—Power of married woman to delegate authority to fill up deed.*—A person competent to convey his real estate, may sign and acknowledge the deed in blank, and deliver the same to an agent with authority to fill up the blank and perfect the conveyance. But a married woman can make no such conveyance of her separate estate, having no authority to delegate such powers.
3. *Married woman—Power to mortgage separate estate.*—The wife has, in equity, the same power over her separate estate as a *feme sole*, and may bind it by mortgage or deed of trust.

Appeal from Pike Circuit Court.

Fagg, Dyer & Biggs, for Appellants, relied on *Drury vs. Foster*, 2 Wall., 24.

McQuie, et al. v. Peay, et al.

E. Robinson, for Respondents.

I. The execution of the deed of trust from Matilda and George W. Peay and Cyrus W. Williams and wife, although the name of the trustee was omitted, created an equitable mortgage, and a court of equity will treat it as such and subject the land to the payment of the notes. (Davis vs. Clay, 2 Mo., 161; McClurg vs. Phillips, 49 Mo., 315; Burnside vs. Wayman, *Id.*, 356; Abbott vs. Godfrey's heirs, 1 Mich., 178; 3 Pow. Mort., p. 1049; 7 Ohio, 68; 10 Ohio, 325; Daggett vs. Rankin, 31 Cal., 321; Racouillot vs. Sausevain, 32 Cal., 376.)

II. The real estate was her separate property, and she could bind it by any instrument showing her intention to charge her separate estate. (Coats vs. Robinson, 10 Mo., 757; Whitesides vs. Cannon, 23 Mo., 457; Claffin vs. VanWagoner, 32 Mo., 252; Schaferth, Adm'r, vs. Amba, 46 Mo., 114; Kimm vs. Weippert, *Id.*, 532; Lincoln vs. Rowe, 51 Mo., 571.)

WAGNER, Judge, delivered the opinion of the court.

The record discloses the following facts: On the 22d day of November, 1869, George W. Peay and Cyrus W. Williams, two of the defendants in this suit, borrowed of Wm. A. McQuie, one of the plaintiffs, the sum of twelve hundred dollars, and executed their note therefor. On the same day they borrowed a like sum of Mary C. Foley, and executed their note for the same. At that time Matilda Peay, wife of Geo. W. Peay, owned and possessed as her separate property a tract of land adjoining Bowling Green, containing twenty acres. To secure the payment of these notes, Matilda Peay and Geo. W., her husband, undertook to execute a deed of trust on the twenty acre tract of land, and Cyrus W. Williams and wife joined in the same instrument, undertaking to execute a deed of trust on certain lands lying in another county.

The deed of trust was defective in the omission to insert the name of any person as trustee. In all other respects it was in the usual form of a deed of trust, including the names

of the grantors and the beneficiaries, reciting the fact that the land was conveyed in trust to secure the payment of the notes, and providing for a sale in case of default in the payment, etc.

After the execution of the notes and deed, Mary C. Foley assigned and transferred her note to Moses Hendricks, one of the plaintiffs herein. Subsequently Matilda Peay died, leaving as her heirs the defendants in this case, to whom the twenty acre tract of land descended.

Peay and Williams having failed to pay the notes, plaintiffs brought this suit in the nature of a bill in equity to have the land subjected to the payment of the debts. The Court rendered a special decree subjecting the land to the satisfaction of the notes, and awarded a special execution.

We entertain no doubt in regard to the correctness of the decision below. Although the neglect or omission to insert the name of some person as a trustee rendered the instrument as a trust deed ineffective, still it does not follow by any means that it was thereby wholly void. It still remained as a valid security for the satisfaction of the debt, and could be enforced as such. The only difference was that there was no person in existence to carry out the provisions of the trust and it was necessary for the beneficiaries to resort to a proceeding in equity to obtain redress. To enable one to sell under a deed of trust, or to obtain a general judgment of foreclosure, the mortgage or the deed of trust must be regular, but if it be irregular, as by the omission of any requisite to a complete instrument, still it will be regarded as an equitable mortgage and held to create a lien, a trust for the benefit of the creditor, and may be enforced in equity. (*Davis vs. Clay*, 2 Mo., 161; *McClurg vs. Phillips*, 49 Mo., 315.)

The doctrine has long been settled, that in addition to the actual, conditional conveyance of land, which constitutes a legal mortgage, courts of equity recognize certain other liens arising from the implied agreement of the parties, or the justice of the case, but not depending upon any express transfer of the title. These are termed equitable mortgages, and in

general an agreement in writing to give a mortgage, a mortgage defectively executed, or an imperfect attempt to create a mortgage or to appropriate specific property to the discharge of a particular debt, will create a mortgage in equity, or a specific lien on the property so mortgaged. (1 Hill Mortg., 4 Ed., 648; Raconillot vs. Sansevain, 32 Cal., 375.)

A similar question to the one we are now considering was presented in the case of Burnside vs. Wayman, (49 Mo., 356). There the trust deed was made and no trustee was selected, but a blank was left in which to insert the name of some suitable person, and the grantor gave the *cestui que trust* authority to appoint a trustee and fill up the blank. The *cestui que trust* neglected to make any appointment, and assigned the note and deed to the plaintiff. The plaintiff then brought his suit to have the deed treated as a mortgage, and the property subjected to the payment of the debt. The Circuit Court granted the relief and we affirmed the decision.

In all cases where the wife has a separate estate, she has, in equity, the same power over it, and may bind it by mortgage or deed of trust as if she were a *feme sole*. And this includes the power in the wife of mortgaging her separate property for her husband's debts, with a power of sale in case of default in payment. (Hill Mortg., p. 13.) If she possesses this power and it is not disputed, then when she executes an instrument for the conditional sale of her separate estate, it will be clothed with all the attributes of an instrument executed by any other person competent to contract.

If it is a regular mortgage it may be foreclosed, or the premises may be sold if it contains a power of sale. If it is irregular or defective, it may be decreed to be an equitable mortgage. But it is contended that the case of Drury vs. Foster, (2 Wall., 24) asserts a different doctrine. In that case Mrs. Foster owned a valuable tract of land in her separate right, and her husband wanting to engage in business, requested her to mortgage it for his benefit. The husband went to an officer and directed him to draw a mortgage on the property with himself and wife as mortgagors, but leav-

ing the name of the mortgagee and the sum for which the land was mortgaged in blank. Foster, the husband, acknowledged the deed in this shape, and the officer then took it to Mrs. Foster, that she might sign and acknowledge it in the same shape. Mrs. Foster told the officer "she was fearful that the speculation which her husband was going into would not come out right; that she did not like to mortgage the place, but that her husband wanted to raise a few hundred dollars," and she did not like to refuse him, and so she signed it.

The magistrate then wrote out and certified a regular acknowledgment on the instrument and gave it to the husband. He came across the plaintiff, Drury, who had money to loan, and obtained \$12,800 on the mortgage and filled it up with that sum, and inserted Drury's name as mortgagee. There was no evidence that Mrs. Foster ever derived any benefit from the money, or knew that such a large sum was ever advanced.

The Supreme Court held that the instrument, when Mrs. Foster signed and acknowledged it, was not a deed or mortgage, that it was a blank paper; that she was disabled from executing or acknowledging a deed by procuration, as she could not make a power of attorney. After admitting that a person competent to convey his real estate, may sign and acknowledge the deed in blank, and deliver the same to an agent with authority to fill up the blank and perfect the conveyance, the court proceeds to say, "But there are two insuperable objections to this view in the present case: First, Mrs. Foster was disabled in law from delegating a power, either in writing or by parol, to fill up blanks and deliver the mortgage; and second, there could be no acknowledgment of the deed within the requisitions of the statute until the blanks were filled and the instrument complete." As the mortgage was incomplete not only as to the grantee, but as to the amount to be inserted, it was nothing more than a blank paper. If such an instrument would have been good, then the wife might as well have acknowledged a blank

Hickerson v. City of Mexico.

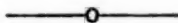
piece of paper, and authorized the writing over it of a mortgage for an indefinite amount. The deed was never before her, and she never acknowledged it, and the officer misconceived his duty.

But the case here is far different. There was no delegation of authority, nor incompleteness as to the amount for which the premises were mortgaged. The deed was full, explicit and definite in all its parts when it was signed and acknowledged, except that the name of the trustee was omitted. This prevented it from being a regular and complete deed of trust, empowering any person to sell in case of default, but it was for a specific sum; the intention to charge the land with the payment of the debt was manifest, and it constituted a good equitable mortgage which might be enforced in equity.

It is insisted that plaintiff, Hendricks, is not entitled to the benefit of any security in the land. But the objection is not sustainable.

The deed created a lien in favor of Mary C. Foley, and whatever rights she possessed Hendricks acquired when he purchased her note. The assignment and transfer of the note carried with it the security as an incident, and the assignee was subrogated to the rights and equities of the person from whom he purchased.

I am of the opinion that the judgment should be affirmed. All the judges concur.



SILAS L. HICKERSON, Appellant, *vs.* CITY OF MEXICO, Respondent.

1. *Trespass for seizing plaintiff's land—Dedication—Res adjudicata.*—Plaintiff sued a municipality in trespass for plowing, scraping and digging ditches upon his land, and claimed that the same was worth a thousand dollars, and that he was injured to that amount. Defendant pleaded a dedication of the land to public use. Judgment was rendered in favor of plaintiff for eighty dollars, and the judgment was satisfied. In subsequent suit by plaintiff against the

Hickerson v. City of Mexico.

corporation for trespass in afterward seizing the same land, *held*, that the former judgment was conclusive against defendant as to the dedication; but that plaintiff might introduce the record of the former suit, and also parol evidence to show that the title and value of the property was not adjudicated in that suit.

2. *Res adjudicata*—Former finding—Parol evidence as to.—Parol evidence is proper in order to show whether a question was determined in a former suit, where the record is not conclusive on that point. The record may be first introduced, and it may then be followed by such parol evidence as may be necessary to give it effect, or show on what issues it was grounded.

Where a number of issues are presented, the finding on any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues.

3. *Res adjudicata*—Evidence *aliunde* as to, may be introduced, when.—In order to show by evidence *aliunde* that a matter is *res adjudicata*, it must appear not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination.

4. *Res adjudicata*—Presumptions as to.—Although it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit.

5. *Res adjudicata*—Presumptions as to proof.—Where matters could have been proved in a former action, the presumption is that such was the fact; but this presumption may be rebutted.

6. *Eminent domain*—Appropriation of land by corporation—Measure of damages.—Where land is taken by a corporation and appropriated to its own use, the entire value of the land is the proper measure of damages. And after receiving the full value, plaintiff cannot again interfere with the land or bring a new action.

Appeal from Audrain Circuit Court.

Craddock, Musick and McFarland, for Appellant.

I. Defendant's evidence of a dedication should have been excluded, because it was *res adjudicata*. (Freem. Judg., §§ 249, 310; Ridgely vs. Stilwell, 27 Mo., 128; Edgell vs. Sigeron, 26 Mo., 583; Offutt vs. John, 8 Mo., 120; Bent vs. Sternberg, 4 Cowan, 559; Dunkle vs. Wiles, 6 Barb., 515; 1 Kern, 420.)

II. Plaintiff's evidence as to value of ground, and of what had been submitted and passed upon by the jury in the trespass case should have been admitted. (Souard vs. City of St. Louis, 36 Mo., 546; Tamm vs. Kellogg, 49 Mo., 118; Freem. Judg., § 273; Spradling vs. Conway, 51 Mo., 51; Wright vs. Salisbury, 46 Mo., 26.)

Hickerson v. City of Mexico.

Forrest & Ladd and J. R. Williams, for Respondent.

I. The judgment offered in evidence was conclusive as to the value of the lands, and the law conclusively presumes that all evidence which could be legally offered under the issues joined was offered, and that the jury considered all the facts bearing upon the claim of damages, consistent with the pleadings, and as to all matters which in fact were or well might have been investigated by the jury, were so investigated. (*LeGuer vs. Governor*, 1 John. Cas., 436; *Cooper vs. Martin*, 1 Dana, 27; *Grant vs. Button*, 14 John., 377; *White vs. Marsh*, *Id.*, 232; *Holden vs. Curtis*, 2 N. H., 268; *Loring vs. Mansfield*, 17 Mass., 394; *Rowe vs. Smith*, 16 Mass., 306; *Kirt vs. Atchison*, 2 Camp., 63; *Lumiss vs. Pulver*, 9 John., 244.)

It follows then, that appellant could not show by parol what evidence was before the jury, or what was passed upon by them in finding the damages announced in their verdict, and that the court did not err in excluding the evidence offered.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff applied for and obtained a temporary injunction to restrain the defendant by its agents and servants from committing a trespass upon his property. From the record it appears that the land upon which the alleged trespass was about to be committed, was a traveled road within the corporate limits of the defendant.

Some time prior to the institution of this proceeding, the plaintiff had commenced his action against the defendant for trespass committed upon the same land, in plowing, scraping and digging ditches thereon. In that case he alleged that the land was worth \$1,000, and that he was injured in that amount.

To the petition therein the defendant filed its answer, averring that the land was a traveled street within its limits; that it had been used as such for a long time, and that it was dedicated to the public.

Upon this issue the parties went to trial, and there was a verdict and judgment for the plaintiff for the sum of eighty dollars, which the defendant subsequently satisfied. After this judgment plaintiff inclosed the ground, and the defendant directed its servants to tear down the inclosure and open the premises to public travel, to prevent which plaintiff applied for the injunction herein.

The defendant in its answer to this suit, set up substantially the same facts which were contained in its answer to the action of trespass, namely, that the ground was a street dedicated to public use.

Upon the hearing of the case, plaintiff introduced in evidence the record of the former action between the same parties. He then offered to show by witnesses, that in that case the only issue presented to the jury and passed upon, was the injury caused by the plowing, scraping and ditching, constituting the trespass complained of, and that the title to the land was not drawn in question, nor was there any testimony in reference to its value. This testimony was excluded by the court. Defendant was then permitted to give evidence tending to show that the land was appropriated and dedicated to public use, to which plaintiff objected. The court then dismissed the bill and plaintiff appealed.

The court erred in allowing defendant, against plaintiff's objections to introduce testimony tending to show that there was an appropriation or dedication of the land for public purposes. That precise question was tried between the same parties in the action for trespass, which was in evidence and was conclusive of the right. Had there been a dedication there could have been no recovery by the plaintiff, and as the matter was determined, it was not open to further contest or dispute.

A judgment in trespass grounded upon the theory that the land belonged to the plaintiff, where a right of way or dedication is pleaded and the finding is adverse to the right claimed by the defendant, is conclusive upon that question in any other action between the same parties. It is not sim-

ply the recovery, but the matter adjudicated in reference to the dedication that creates the estoppel. (Freem. Judgm., § 310; Outram vs. Morewood, 3 East., 346; Warwick vs. Underwood, 3 Head, 238.)

The evidence offered by the plaintiff to show upon what issue the trespass case was decided should have been admitted. It is undoubtedly true that in some of the earlier cases, it was decided that a judgment was conclusive as to all facts arising upon the record which were or might have been passed upon. But it is now generally, if not universally, conceded, that parol evidence may be received for the purpose of showing whether a question was determined in a former suit.

The record may first be put in evidence, and then it may be followed by such parol evidence as may be necessary to give it effect, or show on what issue it was grounded. When a number of issues are presented, the finding in any one of which will warrant the verdict and judgment, it is competent to show that the finding was upon one rather than another of these different issues. In order to show by evidence *aliunde* that a matter is *res judicata*, it must appear not only that it was properly in issue in the former trial, but also that the verdict and judgment necessarily involved its determination.

If it appears *prima facie* that a question has been adjudicated, it may be proved by parol testimony that such question was not in fact decided in the former suit. Where matters could have been proved in a former action, the presumption is that they were proved, but this presumption may be rebutted and overthrown. (Freem. Judg., §§ 273, 274, and cases cited; Packet Co. vs. Sickles, 24 How., 333; Same vs. Same 5 Wall., 580; Bell vs. Hoagland, 15 Mo., 360; Clemens vs. Murphy, 40 Mo., 121; Wright vs. Salisbury, 46 Mo., 26; Wells vs. Moore, 49 Mo., 229; Spradling vs. Conway, 51 Mo., 51.)

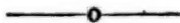
The pleadings in the trespass case alleged the full value of the land, and then by an averment declared that defend-

French v. Woodward, et al.

ant, by its agents and servants, entered thereon with teams, plows and scrapers, and plowed up the land and cut ditches by which plaintiff was injured, etc. The question of the value of the land was not necessarily involved in deciding upon the trespass.

If the defendant took the land and appropriated it to its own use, then the entire value of the land would be the proper criterion or measure of damages. And after having received the full value, the plaintiff could not again interfere with the land, or bring a new action. (*Mueller vs. St. Louis & I. M. Railw.*, 31 Mo., 262; *Soulard vs. City of St. Louis*, 36 Mo., 546.) The ultimate and final determination must depend upon what theory the damages were assessed in the trespass suit.

Grave doubts are entertained as to whether injunction was the proper remedy here, but as that point was not raised or discussed by the counsel for the respondent, I have thought it better to waive the question and look into the merits of the case. The result is that the judgment must be reversed and the cause remanded. The other judges concur.



J. C. FRENCH, Plaintiff in Error, *vs.* W. H. WOODWARD, *et al.*,
Defendants in Error.

1. *Construction of statute—Re-enactment by reference—Constitution.*—An act declaring that a previous act "is hereby amended so as to authorize the city marshal to act as deputy constable, etc." is in conflict with Art. IV, subd. 25, of the State Constitution, as re-enacting a law by mere reference. (See *Mayor, etc., vs. Trigg*, 46 Mo., 288.)

Error to Audrain Circuit Court.

Ira Hall, for Plaintiff in Error.

McIntyre & Keenan, for Defendants in Error.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff, French, brought his action in the Andrain Circuit Court, against the defendants, Woodward and Barada, charging them with taking and converting to their own use certain personal property of his. They, in addition to other matter set up in their answer, justified under an execution placed in the hands of Barada, one of the defendants, as deputy constable. It was developed in the pleadings, and also in the evidence adduced at the trial, that Barada, at the time of the levy of the writ, was city marshal of the city of Mexico, and held an appointment also, as the deputy of Roseberry, the constable of Salt River township, in which the levy on and seizure of plaintiff's property under the writ referred to, took place; and the point was distinctly made by the plaintiff in his reply to the defendant's answer, and in objections to the introduction of testimony showing the appointment of Barada as a deputy under Roseberry, and in an instruction to that effect, which was refused, that the appointment of Barada, under the circumstances, was in violation of the charter of the city of Mexico, and therefore illegal.

The act incorporating that city was approved February 17, 1857, § 3 of Art. VII, of that act among other things providing that the marshal of that city should "hold no other State, county, or city office, nor act as deputy of such other officers during the term for which he shall hold the office of marshal." The act just referred to was amended by an act approved March 18, 1871. Section 2 of that act is somewhat amendatory of § 3, Art. VII, of the act first mentioned, but not, in any particular, worthy of present notice.

Afterwards, the legislature by an act, approved March 27, 1872, entitled, "An act to amend an act entitled 'an act to incorporate the city of Mexico' approved February 17th, 1857, and an act amendatory thereof, approved March 25th, 1871," effected many changes in the law in relation to that city. But the only section of that act having any bearing on the point in hand, is section four in these words: "That § 3 of Art. VII, of the last named act (*i. e.* that of March 1871)

be, and the same is hereby amended so as to authorize the city marshal to act as deputy constable in Salt River township, Andrain County, Missouri, in addition to his present duties."

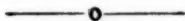
It will need but a very cursory examination in order to determine that this section is clearly obnoxious to the charge of unconstitutionality in this particular. It does not set forth, nor publish at length as if it were an original act or provision, "the act or part of act amended," as required by the twenty-fifth sub-division of Art. IV, of our constitution, but simply refers to a section and says "the same is hereby amended so as to authorize," etc., etc. To hold such an attempted amendment as this sufficient, would be to act in flagrant violation of a very admirable constitutional provision, one which, if heeded, would greatly tend, by the prevention of ambiguities and uncertainties in legislative enactments, to discourage litigious strife, and one which, if obeyed, in the instance under discussion, might have entirely prevented or at least have given a much narrower basis for the present litigation. The provision of the constitution, to which reference has been made, has heretofore received the consideration of this court in the case of *The Mayor, etc. of the City of Booneville vs. Trigg*, (46 Mo., 288,) and in that case the amendment of so much of section one of the act of February 8th, 1839, as related to the bounds and limits of the city of Booneville, by the act of March 23, 1868, was held valid for the reason, that the portion of the section amended, and in so far as it referred to the enlarged boundaries of the city, was "set forth and published at length," in strict conformity to the constitutional mandate.

But in the case at bar, it will be observed by an examination of the different acts before referred to, in relation to the city of Mexico, that not only was the constitution disobeyed in the act of March 27, 1872, in the particular already pointed out, but in addition to that, section four of that act makes reference to, and professes to be amendatory of section third of Art. VII, of the act of March, 1871, when as a matter of

fact while there is a section answering to that description in the act of February 17th, 1857, there is no such section in the act sought to be amended. The section intended to be changed was, no doubt, section two of the act of March, 1871, and singularly enough, even the date of that is misrecited in the caption of the act of March, 1872, above referred to, it being mentioned as approved March 25th, 1871, when the true date of its approval is March 18th, of that year. Such inaccuracies as these might not have been sufficient to have overthrown the attempted amendment, but they certainly would have caused grave doubts as to its validity; and this shows, in a very conspicuous manner, the wisdom displayed in the organic law of those States, where such inaccuracies are for the most part prevented by a provision requiring the entire act revised or section amended to be re-enacted and published at length. The constitutions of the States of Louisiana and Indiana are alike in this regard and in that matter superior to our own.

As the act of March 27th, 1872, on which the defendants relied, must be held in consequence of its non-compliance with the constitution as invalid, and therefore, affording no protection to the defendants who acted under a belief of its validity, it would be no avail to them if every other point raised in the case were ruled in their favor.

Judgment reversed and cause remanded; all the judges concur.



JAMES D. DILLARD & WALKER T. FIELDS, Respondents, vs. St. LOUIS, KANSAS CITY & NORTHERN R. Co., Appellant.

1. *Damages—Action before a justice for killing stock and injuries to harness—Jurisdiction as to amount.*—Where suit is brought before a justice of the peace against a railroad company combining a claim for killing a horse with a claim for injuries to the harness, it must be instituted under sub-division 3, of § 3, Art. I, of the act touching justices of the peace; (Wagn. Stat., 808-9,) and judgment for the combined injuries must be limited to fifty dollars. Such

Dillard v. St. L., K. C. & N. R. R. Co.

suit cannot be brought under sub-division 5, for killing the horse, and in the same suit also under sub-division 3, for damage to the harness.

2. *Justices' courts, jurisdiction of.*—Justices' courts cannot exercise any jurisdiction except that conferred by statute.

3. *Justices' courts—Jurisdiction as to amount—Motion to dismiss in Circuit Court.*—Where the judgment rendered by a justice exceeds his jurisdiction, the case may be dismissed on motion in the Circuit Court.

Appeal from Audrain Circuit Court.

W. Blodget & M. McKeag and Geo. B. McFarlane, for Appellant.

I. Having claimed damages to the amount of \$50.00 for injuries to personal property under the third sub-division of § 3, Chap. 82, pp. 808-9, plaintiffs could not in the same suit claim \$150 damages under the fifth sub-division of said section. (Buckner vs. Armour, 1 Mo., 534; Glasby vs. Puett, 26 Mo., 122.)

Forrist & Ladd, for Respondents.

I. As to the horse killed, value could not be a jurisdictional element, and, whether great or small, cannot now be considered in determining the jurisdictional question raised.

II. The statement could contain but a single count because there was but a single cause of action; and in all respects where the averment of value could be material in determining the magistrate's jurisdiction, the value was placed at \$50, a sum confessedly within the jurisdiction of the magistrate, and in legal effect, for all the purposes of determining the question of jurisdiction, the case stands as if respondents had claimed and demanded only such sum of \$50.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace on the following statement or cause of action:

"James Dillard and Walker Fields say, that they are partners, doing business under the firm, name and style of Dillard & Fields, and that the defendant is a corporation created by and existing under the laws of, and doing business in

the State of Missouri, by operating a railroad running from St. Louis to Moberly in said State, and through township of Salt River and the City of Mexico in Audrain county, in said State; that on or about the 23rd day of July, 1872, the plaintiffs were the owners of one horse of the value of \$150, and a set of harness thereon of the value of \$50, and which horse and harness on said last named day, in Salt River township, by a train of cars of defendant, then there being run over and along defendant's said railroad, managed and controlled by the defendant, its agents and servants, run over and killed said horse, and broke, injured and destroyed said harness; that said defendant, its agents and servants in running and managing said train, then there run and managed it in a negligent and careless manner, and by means of such negligence and carelessness of said defendant, its agents and servants, said horse was killed and said harness destroyed; that said Salt River township in which said horse was killed, as alleged, is the same township, of which, D. M. McIntyre, before whom this suit is pending, is a justice of the peace. By means of all the premises, plaintiff hath been damaged in the sum of \$200, and for which he asks judgment with costs."

A trial was had before the justice, where a judgment was rendered in favor of the plaintiffs for the sum of \$175. From this judgment the defendant appealed to the Audrain Circuit Court. In the Circuit Court the defendant appeared and filed its motion to dismiss the suit, for the reason, as was charged, that the court had no jurisdiction over the subject matter as combined, and for the amount claimed, and for which judgment was rendered.

This motion to dismiss the suit was overruled by the court and the defendant at the time excepted. A trial was afterwards had and judgment rendered in favor of the plaintiffs for the sum of \$170.

The defendant filed its motions for a new trial, and in arrest of judgment, setting forth all of the usual grounds for said motions, as well as that the justice of the peace before whom the action was brought had no jurisdiction of the cause

Dillard v. St. L., K. C. & N. R. R. Co.

of action, and that the motion to dismiss filed by the defendant was improperly overruled by the court.

The motions for a new trial and in arrest of the judgment being severally overruled by the court, the defendant accepted and appealed to this court.

During the progress of the trial had in the Circuit Court a number of exceptions were saved to the rulings of the court in the admission and exclusion of evidence, and in the giving and refusing instructions asked for by the parties, but with the view taken of the case by this court, it becomes wholly unnecessary that they should be investigated in the decision of the case.

The important question in the case is, had the justice of the peace jurisdiction of the cause of action? By the third section of the statute concerning the jurisdiction of justices of the peace, (Wagn. Stat., 808,) it is provided that "justices of the peace and the Circuit Courts shall have concurrent jurisdiction in the following causes; First—in all actions founded on contracts, when the debt or balance due, or damages claimed, exclusive of interest, shall exceed fifty dollars and not exceed ninety dollars; Second—in all actions on bonds and notes for the payment of any sum of money exceeding fifty dollars, exclusive of interest, and not exceeding one hundred and fifty dollars; Third—in all actions for injuries to persons, or to personal or real property, wherein the damages claimed shall exceed twenty dollars, and not exceeding fifty dollars; Fourth—all actions for the recovery of specific personal property not exceeding the value of one hundred dollars, alleged to be wrongfully detained, and damages for injuries thereto, or for the taking and detention, or detention thereof, not exceeding twenty-five dollars; and Fifth—in all actions against any railroad company in this State, to recover damages for the killing, crippling or injuring of horses, mules, cattle or other animals within their respective townships, without regard to the value of such animals, or the amount of damages claimed for killing, crippling or injuring the same." There are other provisions made for the

jurisdiction of justices of the peace in counties containing over fifty thousand inhabitants, but they have no application to the facts of this case.

It will be seen by reference to the foregoing section of the statute, that jurisdiction is conferred on justices of the peace by the third clause in said section over actions for injuries to persons, or to personal or real property wherein the damages claimed do not exceed fifty dollars; and by the fifth clause, jurisdiction is conferred on justices of the peace over all actions against railroad companies to recover damages for killing, crippling or injuring horses, mules, cattle or other animals in their respective townships without regard to the value of the animals or the amount of damages claimed. If the justice of the peace had jurisdiction over the cause of action tried and determined in this case, it must have been conferred by one or both of the clauses of the statute just referred to. It is insisted by the plaintiff that the jurisdiction of the justice over the cause was conferred by both of these clauses; that by the third clause the justice had jurisdiction over that part of the action which seeks to recover for the injury to, or destruction of the harness of the plaintiffs, to the amount of fifty dollars, the same being an injury to personal property, and that by the fifth clause, the justice had jurisdiction over that part of the cause of action which seeks to recover for the killing of the horse of plaintiffs without regard to the value of the horse or the amount of damages claimed, and that as there is no limit as to amount of damages recoverable before a justice of the peace for killing the horse, it adds nothing to the amount of damages claimed for the injury to the harness as damages for an injury to personal property under the third clause.

I cannot see the force of this argument. The action was brought to recover for a single injury. By one single act, two classes of property were injured, but the cause of action accruing to the plaintiffs by which they would recover for the entire injury, constituted but one single cause of action which cannot be severed in order to give the justice jurisdiction to try the cause.

Dillard v. St. L., K. C. & N. R. R. Co.

If the action had been brought simply to recover damages for killing the horse, then the justice of the peace would have jurisdiction under the fifth clause of the statute without regard to the value of the horse or the amount of the damages claimed; but this is not an action to recover damages for an injury to a horse or other animal; but the action is to recover damages for an injury by the defendants to a horse and other personal property, and therefore, the jurisdiction of the justice could not be derived from the fifth clause of the statute, for, as I understand it, the cause of action being only one single cause of action, it must be wholly covered by the provisions of the statute conferring the jurisdiction. Justices' courts being courts of limited and special jurisdiction, they cannot exercise any jurisdiction except what is conferred by the statute. The third clause of the statute giving jurisdiction to justices of the peace over causes of action brought to recover damages for an injury to personal property wherein the damages claimed do not exceed fifty dollars, is the one which must govern this case, and as the damages claimed by the plaintiff's cause of action were two hundred dollars, it was beyond the justice's jurisdiction. And it makes no difference that the motion to dismiss was not made before the justice, as the want of jurisdiction in the court over the cause of action cannot be waived, but may be insisted on at any stage of the proceedings. (*Webb vs. Tweedie*, 30 Mo., 488.)

It follows that the Circuit Court improperly overruled the defendant's motion to dismiss the suit and its motion to arrest the judgment.

The judgment must be reversed and the cause dismissed at the plaintiff's costs. The other judges concur.

Dowzelot, et al. v. Rawlings.

EUGENE DOWZELOT, *et al.*, Respondents, *vs.* CHARLES RAWLINGS, Appellant.

1. *Partnership—Dissolution—Notice of, when necessary—Member suffering name to remain in firm.*—As to persons who have had no previous dealings with or knowledge of a firm, or of those who composed it, no notice of its dissolution is necessary, in order to prevent liability in consequence of subsequent debts or engagements from attaching to the partner who has retired. If, however, a former partner suffers his name to appear as still belonging to a firm from which he has retired, he will be held liable to any one, who, by his conduct in this particular, has been misled into giving credit to the firm. And this will be the case whether notice be given by publication or not.
2. *Pleading—Admissions in, may be used in other suit, etc.*—Admissions contained in a pleading may be used against the party in another suit; and this, wholly regardless of the question, whether the person himself was in fact cognizant of the pleading. The act of the attorney in such case will be held to be the act of the party.
3. *Partnership—Declarations of members will bind firm, when.*—While a partnership continues the declarations of either of the partners made in respect to the business of the firm will bind it. But this power ceases with the dissolution.
4. *Jury, additional instructions to.*—It is not error to give the jury additional instructions, when, after returning, they report their inability to agree.

*Appeal from Audrain Circuit Court.**Forrist & Ladd*, for Appellant.*Gordon & McIlhany with E. B. Sherzer*, for Respondents.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiffs were commission merchants in the city of St. Louis. The defendant, Rawlings, and one Pennison were partners in baling and shipping hay at Centralia, Mo., in the latter part of 1871, and the first part of 1872.

They had no sign erected at their place of business. No notice was published announcing the dissolution of the firm; and the time when such dissolution occurred is not clear. There was a tendency in the evidence to show that this event occurred on the 20th day of February, 1872, and there was also evidence in conflict with this, and tending to show that such dissolution did not occur until a later period. Pennison came down to St. Louis about the 26th or 27th of February, 1872, and applied to plaintiffs firm for an advance on three cars of hay, stating that he and Rawlings were partners, and that the most of the hay would be shipped next day, and the residue in a few days thereafter.

Dowzelot, et al. v. Rawlings.

There had been no previous acquaintance or dealings between the parties; but one of plaintiff's firm testified to having before this, seen hay in cars at the N. M. R. R. depot, covered with tarpaulin, marked "Pennison & Rawlings," and that hay is usually covered in that way, and marked with the name of the shipper.

Plaintiffs advanced the sum of \$350 by check, in favor of Pennison and Rawlings. The hay was never shipped nor the money refunded.

1st.—As to persons who have had no previous dealings with or knowledge of the firm, or of those who composed it, no notice of its dissolution is necessary in order to prevent liability in consequence of subsequent debts or engagements, from attaching to the partner who has retired.

The object in giving notice, is to remove the impression which has been created on the minds of those who have dealt with, or had knowledge of the firm, that certain persons continue to compose it. Now, so far as mere strangers are concerned, it is obvious that no such impression can exist, and they cannot be said to give credit to, or place reliance on, a person of whom they are ignorant. If, however, a former partner willingly suffers his name to appear as still belonging to the firm from which he has retired, as for instance, in the title of the firm over the door of the shop or store, he will be held liable to any one who, by his conduct in this particular, has been misled into giving credit to the firm of which he continues an ostensible member, and this will be the case, whether notice be given by publication or not. Some of the authorities hold, that public notice of dissolution is necessary even as to strangers. But the doctrine I have stated, is that maintained by Judge Story, and also Chancellor Kent; (Sto. Part., § 160; 3 Kent's Com., 68,) and has heretofore received the approval of this court. (*Pope vs. Risley*, 23 Mo., 185.)

The refusal of the court below to conform its instructions to this view of the law, must therefore be regarded as erroneous.

Dowzelot, et al. v. Rawlings.

2nd.—The evidence in this case by no means tends to show that the plaintiffs, prior to advancing the money, ever knew that Rawlings was a member of the firm to which they gave credit; nor does the fact of his being a partner appear to have been so notorious as to give rise to the presumption that they must have known it. (*Carter vs. Whalley*, 1 B. & Ad., 11; 3 Kent, 68.) Under such circumstances, plaintiffs must be deemed strangers in the strictest sense of the term.

3rd.—It was perfectly competent for plaintiffs to offer in evidence the petition which the attorney of Rawlings, at the latter's instance, had filed in the suit against Pennison; and this wholly regardless of the question, whether Rawlings had ever seen the petition after it was drawn up, or not?

The act of the attorney was the act of the defendant, and any admissions contained in the petition, could be received against, and be binding upon him. "Thus where a carrier brought trover against a person, to whom he had delivered the goods intrusted to him, and which were lost, the record in this suit was held admissible for the owner, in a subsequent action brought by him against the carrier, as amounting to a confession in a court of record, that he had the plaintiff's goods." (1 Greenlf. Ev., §§ 195, 527.)

4th.—There was error in admitting the testimony of Dowzelot in reference to the statements of Pennison, in May or June, 1872. And for this reason, while the partnership continues, the declarations or admissions of each of the partners made in respect to the business of the firm, will bind it. But upon the occurrence of a dissolution, this power to bind the firm by either acts or declarations comes to an end. (Greenlf. Ev., § 112; *Sto. on Part.*, §§ 107, 323; 3 Kent, 50; *Pope vs. Risley*, 23 Mo., 185). The chief point at issue in the case was, whether the partnership of Rawlings with Pennison had continued down to a certain time. To prove this continued existence however, the mere declarations of Pennison, were as incompetent as though offered to establish the original formation of the partnership. Pennison was a competent witness, and his statements made outside of the above

Morris v. St. L., K. C. & N. R. R. Co.

mentioned limits, had no greater force nor effect than the unsworn statements of any one else.

5th.—There was error also, in the action of the court in the instruction given to the jury after they had returned and reported their inability to agree: But the error consisted in the form of the instruction, and not in the time at which it was given. There may be instances when it will become the imperative duty of a court to rectify some omission, or cure some oversight, by giving to a jury under the circumstances I have mentioned, an additional instruction.

Judgment reversed and cause remanded; Judge Lewis not sitting, the other judges concur.

—o—

P. S. MORRIS, Defendant in Error, vs. ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY Co., Plaintiff in Error.

1. *Damages—Stock killed at railroad depot—Killed at switch—Negligence—Proof.*
—Where stock is killed on the grounds of a railroad at a depot, and it is necessary for transaction of business that the space shall be kept open, the company will not be liable without proof of negligence, notwithstanding the fact that the road is not fenced at that point. But where stock is killed on a railroad switch at a point where it is unnecessary to keep the road open in order to transact business, the company will be liable without proof of negligence.
2. *Damages—Property owned by minor son—Father cannot recover for.*—A father cannot recover damages from a railroad company for killing stock owned by his son, although the latter is a minor.

Error to Audrain Circuit Court.

Woodson, Blodgett & McFarlane, for Plaintiff in Error.

VORIES, Judge, delivered the opinion of the court.

This action was commenced before a justice of the peace in Audrain county. The action was brought under the fifth section of the act concerning "Damages and contributions in actions of tort," (Wagn. Stat., 519) to recover damages for

the killing and crippling by the locomotive of defendant of two mules and one horse colt, alleged to be the property of the plaintiff.

A judgment was rendered by the justice in favor of the plaintiff for the value of the animals killed and injured. From this judgment an appeal was taken to the Andrain Circuit Court, where the plaintiff again recovered judgment.

In due time the defendant filed motions for a new trial and in arrest of the judgment, which were severally overruled by the court, and the case has been brought to this court by writ of error.

The evidence introduced in the trial of the case in the Circuit Court, tended to prove that the mules and colts sued for were killed and injured at a cattle guard situate about one fourth of a mile west of Thompson's Station, in Andrain county; that said station is situate in an open prairie country, has a passenger depot and stock pens situate thereat, and a switch to the road has been constructed at the station, which extends west from the station to within about forty yards of the cattle guard where the injury to the stock took place; that from this cattle guard west the defendant's railroad is fenced, but that the space of about one-fourth mile between where the mules and colt were injured and the depot is open, unfenced prairie land; that the switch to the road extends west to within forty yards of where the fence inclosing the railroad commences; that the mules had entered upon the road at or near the station, and had run down the track to where they were injured; that the train of cars by which the injury was inflicted, was going west, and made no stop at the station; that the mules had escaped from plaintiff's pasture the night before the injury, and had gone on the track. One mule and the horse colt were killed, and the other mule crippled. The mule killed was proved to be worth \$225; the other mule was injured to the amount of \$25, and the horse colt was shown to be worth \$75. The colt belonged to a minor son of the plaintiff. The injury was shown to have been by a train conducted by the servants of

defendants. At the close of the evidence, the court, at the instance of the plaintiff, instructed the jury as follows :

1. "If the jury believe from the evidence in the case, that the plaintiff's mules and colt were killed and injured by the cars, locomotive or other conveyance used on defendant's road, and that the accident did not occur at the crossing of a highway, nor on a portion of defendant's road inclosed by a fence, nor where the said road crossed the plat of any town or city, then the defendant will be liable irrespective of the question of negligence, and the jury should find for the plaintiff."

2. "If the jury believe from the evidence in the case, that defendant's road was not fenced at the place where the damage was done, and where said road does not cross any street or highway, and where the said road does not cross the plat of any town or city, it matters not that the highest degree of care was exercised by the defendant's agents and servants, the defendant is liable notwithstanding, and the jury should find for the plaintiff."

These instructions were objected to by the defendant, and exceptions taken. The defendant then asked the court to instruct the jury, among other instructions, as follows :

1. "The court instructs the jury that the plaintiff is not entitled to recover in this action under the statement and evidence." 2. "If the jury believe from the evidence, that plaintiff's mules and colt were killed or injured upon a portion of defendant's road included in the switch limits of the depot, or if such mules and colt got upon the track of defendant's road at such switch, then plaintiff is not entitled to recover in this action." 3. "If the jury believe from the evidence, that the colt charged to have been killed by defendant's railroad machinery was the property of the son of the plaintiff, they will not be authorized to find for the plaintiff damages for killing such colt, although the son may have been a minor."

These instructions were refused by the court, and exceptions saved. The verdict and judgment were for the aggregate value of the mules and colt, as shown by the evidence.

There are several minor exceptions saved in the record, but the only questions presented in this court for consideration, grow out of the action of the court in giving and refusing the instructions herein set forth. The statute under which this action was brought, provides in general terms that when any animal shall be killed by the cars or other carriage of a railroad company, the owner may recover its value without any proof of negligence or unskillfulness on the part of the agents or servants of the company. But it is further provided that the provisions of the section shall not apply to any accident happening where the road is inclosed by a lawful fence, or in the crossing of any public highway.

The first and second instructions given by the court on the part of the plaintiff, are justified by a literal construction of the statute, and there may be many cases where the evidence would fully justify said instructions. For if there was no evidence in the case to show that the animals came on the road or were killed at a place where it would be unlawful or impracticable for the company to fence its road, the instructions as given would be wholly proper. But it is insisted in this case, that there was evidence tending to show that the mules and the colt which were killed or injured, came on to the railroad track through the open ground at the depot, where it was necessarily left open for the use and convenience of the company and its passengers, and those who brought freight to the depot for transportation, and that it was wholly impracticable to fence the road at such place without destroying the use for which the road was intended, and that these facts in the case were wholly ignored by the court in the instructions given.

In the case of *Lloyd vs. The Pacific Railroad Co.*, (49 Mo., 199) decided by this court, it was held that where a cow was killed in the open grounds of the defendant at a station or depot on the road, and that it was necessary, for the transaction of business with the public and the reception and discharge of freight and passengers, that such space should be

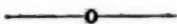
left open, the company in such case would not be liable without the proof of negligence, notwithstanding the road was not fenced at such place; and that the same ruling would be made where the injury happened in a town where there were streets to be kept open, and where to fence the road would be to create a nuisance. It would seem from the interpretation of the statute given in that case, that the instructions given by the court in view of the evidence in this case would be improper. At least they would be improper without an accompanying instruction to qualify or modify their language to conform them to the facts in evidence, and the interpretation of the statute as given in the case referred to.

It is next insisted that the court erred in refusing the instructions asked for by the defendant. The first instruction asked for by the defendant was properly refused; the facts should have been submitted to the jury for their decision. By the second instruction asked for by the defendant, the court is asked to tell the jury that, if the mule and colt were killed or injured upon a portion of the road included in the switch limits of the station or depot, or if they got upon the road at such switch, the plaintiff could not recover. That instruction was also properly refused. There is no reason why defendant should not fence its road along each side of the road where it has a switch, as well as at other places. Where a switch extends along the main track for a considerable distance through an open prairie, it is just as necessary and practicable to have the road fenced as upon any other part of the road, and we are not inclined to extend the rule laid down in the case of *Lloyd vs. The Pacific Railroad Co.*, before referred to, further than the facts of that case will justify, and that is, that the company is not required to fence such grounds as are *necessary* to remain open for the use of the public and the necessary transaction of business at the depot or station.

The fourth instruction asked by the defendant ought to have been given. If the colt sued for was not the property of the plaintiff he had no right to recover its value in an ac-

tion in his name, and in his own right, and it can make no difference that the plaintiff's son, to whom the colt belonged, was a minor, and the evidence clearly tended to prove that the colt belonged to the son of the plaintiff.

The judgment will be reversed and the cause remanded; the other judges concur.



CAPE GIRARDEAU & STATE LINE RAILROAD COMPANY, Respondent, *vs.* GEORGE G. KIMMEL, Appellant.

1. *Account stated—Evidence—Assent.*—A petition to recover an alleged balance found due upon settlement with the defendant, is not sustained by proof of the indebtedness concerning which the alleged settlement was made. It must appear that the defendant assented to the settlement or to the balance found against him.
2. *Account stated—Evidence—Dissent of party.*—An action upon account stated cannot be maintained where it appears that the defendant at the time dissented from the balance found, and claimed an additional credit which was disallowed.
3. *Corporations—Minutes—Evidence—Stranger—Settlement.*—The minutes of the board of directors of a corporation are not competent testimony against an outside party to prove a settlement made with him by a committee.

Appeal from Cape Girardeau Court of Common Pleas.

Lewis Brown, for Appellant.

I. At the close of plaintiff's evidence in chief, there having been no evidence offered tending to show "a final settlement on the 5th day of July, 1872," and a balance due from defendant of \$298.42, or a less amount, the defendant's motion to dismiss should have been sustained, because there was an utter failure of proof. (Clark *vs.* Han. & St. Jo. R. R. Co., 36 Mo., 202; Smith *vs.* Han. & St. Jo. R. R. Co., 37 Mo., 287; Boland *vs.* Mo. R. R. Co., 36 *Id.*, 484; Jaccard *vs.* Anderson, 37 *Id.*, 91.)

II. The introduction of the minute book of the company to show a "final settlement," as well as the copy of the de-

fendant's statement dated May 20th, 1872, was improperly permitted, because: 1st—both were secondary evidence; 2nd—the treasurer's book (shown to be in court) and the original statement were the best evidence, and should have been produced or accounted for, and did not tend to prove a "final settlement;" 3rd—a party cannot prove his own admissions; (Moore vs. Sauborin, 42 Mo., 494; 38 Mo., 494; 33 Mo., 535,) 4th—the evidence must be pertinent to the issue. The minute book of the company shows only the report of a committee "appointed to settle with the late treasurer;" but does not show any assent of defendant to such settlement.

Louis Houck, and Alex. Ross, for Respondent.

LEWIS, Judge, delivered the opinion of the court.

The cause of action is stated in the petition as follows: "That the defendant was the treasurer of plaintiff, acted and served as such from the 20th day of January, 1872, to the 5th day of July, 1872, and that he, as treasurer of plaintiff, on final settlement, on, to-wit, the said 5th day of July, 1872, was indebted to plaintiff in the sum of \$298.42 balance on his settlement as treasurer of plaintiff; that the said balance due as aforesaid was demanded in writing; that the said defendant, although requested to pay said amount, has failed, refused and neglected and still fails, neglects and refuses to pay said amount. Wherefore plaintiff asks for judgment against the defendant for the sum of \$400, with its costs."

If any recoverable demand appears in this statement it is upon an account stated, as known to the common law. It is not alleged that the defendant ever received any money belonging to the plaintiff, or that he did any other act which could of itself originate an obligation to pay what the plaintiff demands. The word "settlement" implies that there were previous transactions between the parties. But whatever obligations such transactions may have imposed on either, became legally merged in the settlement or account stated, and a new obligation then attached to the party found in ar-

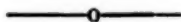
rear, which the law construes into a promise that he would pay the balance so agreed to be due. To maintain an action upon such premises, the first essential is, that the balance be acknowledged by the party to be charged. If a plaintiff seeks to recover for money received by the defendant and not accounted for, he must make those facts distinctly appear in his pleading. But if, in his petition, he elects to rely on a settlement made and a balance struck and agreed upon, he cannot in his proofs abandon that ground of recovery and fall back upon the original subject matter of the settlement. He may prove the earlier transactions, if necessary, as a foundation for the settlement and in order to explain it. But the settlement itself, or rather the defendant's assent in some shape to a balance found due, is none the less essential, as the very bottom upon which the right of recovery rests. These principles are as old as the law books, and as familiar to the profession.

The petition in this case is defective in its omission to state the defendant's promise—which, though implied in law must be pleaded as a fact—to pay the balance found against him. But as this defect was not objected to and was cured by the verdict, it is immaterial here.

The bill of exceptions purports to contain all the testimony offered in the cause. I have carefully examined it and cannot find a fact proved which even remotely tends to show that there was any final settlement or account stated between the parties. The defendant made a financial statement in May. But this was nearly two months before he ceased to act as treasurer, and before the alleged final settlement upon which the plaintiff sought to recover. The minutes of the board of directors were read to show that a committee reported the fact of their having settled with the defendant. This might have been proof against the corporation, but, as against the other party it was only hearsay. Moreover, if it established anything, it was the reverse of the essential feature in the plaintiff's case. The report exhibited the defendant's dissent from the committee's settlement, with his claim to an additional credit of \$316.33 which they refused.

City of St. Charles v. Meyer.

The whole conduct of the trial was apparently based upon an idea that the jury were to act as accountants between the parties to ascertain how the balance between them ought to stand upon a fair settlement. Testimony was admitted or excluded and eighteen instructions were given or refused upon that basis. The court proceeded upon a false theory from the beginning and so the record abounds with errors against both parties. With the concurrence of the other judges, the judgment is reversed and the cause remanded.



CITY OF ST. CHARLES, Appellant, vs. WILLIAM MEYER, Respondent.

1. *Corporations, municipal—Ordinance—Disturbing the peace—"Charivari."*—A city ordinance providing that "every person who shall willfully disturb the peace * * * by loud or unusual noise, by blowing horns, trumpets or other instruments, * * * or by any other device or means whatsoever, * * * shall be deemed guilty of a misdemeanor," is not violated by parties engaging in a "charivari," unless the effect is to disturb the peace and quiet of the citizens or some of them.
2. *Ordinance—Disturbing the peace—Evidence—Defense.*—In a prosecution for disturbance of the peace, testimony to the effect that the peace of certain individuals was not disturbed, may be admissible for the purpose of weakening the force of the prosecutor's testimony touching the offensive character of the noises; but not as showing a specific defense.
3. *Practice, criminal—Disturbing the peace—Evidence—Rebuttal.*—Testimony in chief having been concluded on both sides, the court committed no error in disallowing proof by the plaintiff that "the peace of individuals and the neighborhood was disturbed." Such proof would not be in rebuttal, but was necessary in the first instance to sustain the charge.

Appeal from St. Charles Circuit Court.

T. F. McDearmon, for Appellant.

Lackland & Broadhead, for Respondent.

LEWIS, Judge, delivered the opinion of the court.

Defendant was charged before the city recorder, with violation of a corporation ordinance, the second section of which is as follows:

"Every person who shall wilfully disturb the peace or quiet of any street, alley, avenue, public square or market place or wharf, landing, vessel, church, theater, house or other building, public or private, family or person within the city, by loud or unusual noise, by blowing horns, trumpets or other instruments, by the rattling or playing of organs, drums, tambourines, kettles, pans, tubs or other sounding vessels, by the rattling of bells or other noisy instruments, engines or machines, by hallooing, shouting, loud and boisterous laughing, bellowings, howlings, swearing, profane, indecent or obscene language or conversation, or by any other device or means whatsoever, or by tumultuous or offensive language or carriage, by threatening, quarrelling, scolding, traducing, cursing, challenging, assaulting, striking or fighting any person under any pretense or pretext whatsoever, shall be deemed guilty of a misdemeanor."

A fine of one dollar being imposed on the defendant, he appealed to the Circuit Court, where a jury trial resulted in his acquittal.

The plaintiff's evidence consisted of the city ordinance and the testimony of two policemen, who stated that the defendant was one of a party engaged in a "charivari." These witnesses saw the participators approaching the scene of one Austerschmidt's wedding festivities, and warned them to desist. They heard the ringing of bells, blowing of horns, shouting, etc., at the house of the wedding, and also at one or two neighboring saloons, and described the uproar in generally emphatic terms. A number of witnesses were examined for the defense, and their testimony was generally to the effect that the noises were very slight, and not of a character to disturb the peace of any body. The bridegroom, who testified, seems to have regarded the visit as a complimentary attention, and, upon the suggestion of his bride, he stipulated for more "music" by the performers, before paying the fee of three dollars, which he understood was customary on such occasions. The happy pair being thus accommodated, the serenaders left, to distribute the proceeds among the saloon-

keepers. No witness on either side testified that he, or any other person, was disturbed by the demonstration.

The appellant complains that error was committed in the admission of defendant's testimony, assuming that its object was to show by way of special defense, that the persons testifying were not individually disturbed by the noises complained of. Such an object alone would be manifestly illegitimate. But the testimony, as we understand it, had a different office to perform. Its tendency, as given, was to weaken the force of the plaintiff's evidence showing the offensive character of the noises, and their adaptability to a disturbance of the public repose. For this end the testimony was proper, and the court committed no error in admitting it.

At the close of the defendant's testimony, the plaintiff offered to prove that "the peace of individuals and the neighborhood was disturbed." Defendant's objection to this was sustained by the court, on the ground that such testimony would not be in rebuttal, and should have been offered in chief. Considering that a disturbance of the peace was the very *gravamen* of the charge, without which the plaintiff had no case, we cannot perceive wherein this action of the court was wrong.

Plaintiff asked the court to instruct the jury that, "if the defendant was engaged in ringing bells, blowing horns or beating pans, or was shouting, hallooing or making loud or unusual noises within the limits of the city, or was with others who were so engaged, the verdict should be for the plaintiff." This was refused, and the court, of its own motion gave instructions to the effect that if defendant "either by himself or in conjunction with others, disturbed the peace and quiet of the citizens of St. Charles, or any of them," by the means complained of, then he was guilty under the ordinance; and that the charge could not be sustained by simply showing that the defendant was engaged in a "charivari," unless the effect of this was to disturb the peace and quiet of the citizens of St. Charles, or some of them.

Against this treatment of the case, appellant's counsel presents an ingenious argument to show that the direct object of the ordinance was a suppression of the nonsensical and pernicious amusement known as the "charivari," and therefore the performance should have been punished, without inquiry into its effect. This is transferring the penalty from the crime to the means whereby it may or may not be committed. Murder may be done by means which would be perfectly innocent in themselves, and but for the effect intended and produced. If the object of legislative censure were the "loud and unusual noise, by blowing horns, trumpets or other instruments," this would apply to every band of skilled musicians marching through the streets. Municipal legislators are the guardians of the public peace, not the arbiters of taste. The St. Charles authorities may well have considered the charivari as calculated to grate harshly on newly-wedded bliss, and thus to disturb the peace of at least two persons who are entitled to the equal protection of the laws. But where, upon their own avowal, the parties most interested seemed to like it, and no other person admits being disturbed by it, there would appear at least a stretch of authority in undertaking to punish the bad taste of the performance.

The ordinance under consideration is strictly modelled after the section of our criminal statute law, which was before this court in *State vs. Fogerson*, (29 Mo., 416) to which case we are referred by appellant. The language there used seems conclusive of this question. Says the opinion delivered by judge Ewing: "The first instruction given on the part of the State, unconnected with others given at the instance of the defendant, is erroneous, because it does not direct the attention of the jury to a particular circumstance essential to an offense, namely, the disturbance of the peace of the neighborhood. It tells the jury that if they believe the defendant used indecent language, or loud or offensive language, in the town of Lebanon, and that such language was willfully used, they must find defendant guilty. These facts may have been found by the jury, and yet no offense have

Cape Girardeau Co. v. HARBISON, Adm'r.

been committed, because no disturbance may have been caused by it. This instruction, then, in this respect, was improper."

Judgment affirmed ; all the judges concur.

—o—

CAPE GIRARDEAU COUNTY, for the use of the ROAD AND CANAL FUND, Plaintiff in Error, *vs.* JOHN HARBISON, Adm'r *de bonis non* of DARWIN B. HARBISON, dec'd, *et al.*, Defendant in Error.

1. *Practice, civil—Trials—Instructions—Questions of law and fact must be distinguished.*—In framing declarations of law for the court sitting as a jury, questions of law and those of fact should be so separated that it may afterwards be seen by which class the general finding was controlled. They should generally conform to the rules established for instructions given to a jury.
2. *Limitations—Promissory note—Mortgage.*—A note or bond may be barred by limitation, and yet a mortgage securing its payment may be enforced against the land mortgaged.
3. *Limitations—Administrator—New promise.*—An administrator cannot, by a new promise, take a debt of his intestate out of the statute of limitations.
4. *Limitations—Presumption of payment—Distinction—Mortgage.*—The defense of the statute of limitations and that of presumption of payment arising from lapse of time, are distinct in their natures and incidents. There is no statute of limitations applicable to foreclosure of a mortgage, but the presumption of payment, by analogy in certain cases, operates with like effect.
5. *Limitations—Real estate—Adverse possession—Mortgage.*—The defense of limitation against the recovery of real estate requires an adverse possession to support it. And no such adverse possession exists in a mortgagor, as against the mortgagee, so long as their original relations continue to subsist.
6. *Limitations—New promise, to a stranger—Admissions—Presumptions.*—A new promise or acknowledgment made to a stranger will not take a debt out of the statute of limitations. But as an admission of fact against the interest of the person making it, it may be evidence sufficient to rebut the presumption of payment arising from lapse of time.
7. *Mortgage—Foreclosure—Administration—Allowance of demand.*—In a proceeding for foreclosure against a purchaser of the land, it is not necessary to show that the debt has been allowed against the estate of the deceased mortgagor.

Error to Cape Girardeau Circuit Court.

Cape Girardeau Co. v. Harbison, Adm'r.

Linus Sanford, for Plaintiff in Error.

I. The presumption of payment from lapse of time is not an absolute bar to the foreclosure of a mortgage, but may be rebutted by evidence. (*Chontean's Ex'r vs. Burlando*, 20 Mo., 486; *Hughes vs. Edwards*, 9 Wheat., 489.)

II. The report of the sale of the real estate by the administrator under the order of the Probate Court, and the subsequent deed of trust executed by John Harbison, furnish ample evidence that the debt has not been paid.

III. Where the plaintiff, to remove the bar of the statute of limitations, proves a general acknowledgment of indebtedness in writing, the burden of proof is on the defendant, to prove that the promise related to a different demand than the one sued on. (*Carr vs. Hurlbutt's Adm'r*, 41 Mo., 268; *Davis vs. Herring*, 6 Mo., 21; *Elliott vs. Leake*, 5 Mo., 208; 2 Greenl. Ev., § 441, *et seq.*, 10 Ed.)

Houck & Ranney, for Defendant in Error.

I. The note and mortgage show that they were executed more than twenty years before the institution of this suit. They also show by the indorsements, that no payments have been made within ten years before the institution of the suit. To take them out of the statute of limitations, then, in order to permit of a foreclosure of the mortgage, the plaintiff must produce evidence to prove that subsequent promises were made by Darwin B. Harbison within ten years of the bringing of this suit; at least he should produce evidence to repel the presumption of payment raised by the statute of limitations. The case of *Chontean's Ex'r vs. Burlando*, (20 Mo., 486) cited by plaintiff, is not in point, because there was nothing to show that the land was wild and unimproved, and no evidence showing that the mortgagor had abandoned all claim to the land, and there was no evidence showing that the debt had not been paid. Also in the case of *Hughes vs. Edwards*, (9 Wheat., 489) cited by plaintiff, there was evidence of promises made by the mortgagor, which would be sufficient to take it out of the statute of limitations.

II. Until entry by the mortgagee for condition broken, or until foreclosure, the mortgagor is the owner of the premises. (*Kennett vs. Plummer*, 28 Mo., 142.) The plaintiff cannot recover unless it shows that it was in possession within ten years before the commencement of this action. (*Wagn. Stat.*, 1872, p. 915, § 1.)

III. The instructions asked by the plaintiff were properly refused by the court, for the reason that the first one assumes that payments were made on the note and mortgage within ten years before the institution of the suit; and the second declares the law to be, that an administrator can, by his admissions and confessions, dispose of the estate of his intestate. The admissions of an administrator are not competent to bind the estate. (*Allen vs. Allen*, 26 Mo., 327; *Thompson vs. Peters*, 12 Wheat., 565; *Ciples vs. Alexander's Adm'r*, 2 Comst., 767.)

IV. The statutes provide that before a claim can be allowed against an estate, it must be supported by the affidavit of the claimant, and by other legal testimony. (*Wagn. Stat.*, 1872, p. 103, §§ 12, 13.)

The administrator did not state how or whether he knew of his own knowledge that the debt was still unpaid, and how could he know except from Darwin B. Harbison himself? The fact that the mortgagor was in possession of the premises during the whole time, is enough to show that he had not resigned his claim to the land, and to raise the presumption that the incumbrance had been discharged.

Lewis, Judge, delivered the opinion of the court.

On March 6, 1849, Darwin B. Harbison executed his bond for \$566, payable in twelve months, to Cape Girardeau county, for the use of the road and canal fund, with a mortgage to secure it on 212 acres of land. Harbison dying, Peter Byrne became his administrator, and in that capacity sold the mortgaged premises in 1864, for payment of debts of the estate; John Harbison, defendant in error, being the purchaser. Afterwards Byrne died, and defendant in error

succeeded him in the administration of Harbison's estate. The present suit is for a foreclosure of the mortgage. The bond is indorsed with a number of payments, the last of which bears date May 2, 1858.

Defendant pleaded the statute of limitations in ordinary form. Plaintiff replied, alleging two several acknowledgments in writing, within ten years before the commencement of the suit; one by Byrne, as administrator, and the other by defendant. The court, sitting as a jury, found for the defendant, and rendered judgment accordingly.

The plaintiff introduced on the trial Byrne's report of his sale as administrator, in which the land was stated to be "subject to a certain mortgage lien for the sum of \$410, and accruing interest." He also introduced a deed of trust executed by defendant to Thomas B. English, in 1866, containing this expression: "It is also understood that the said first mentioned tract, or the one-third part thereof, owned by said deceased, was by him mortgaged to the county of Cape Girardeau for the sum expressed in said mortgage, and which yet remains unsatisfied."

At the close of the trial plaintiff offered the following declarations of law, which the court refused: 1. The payments on the note secured by mortgage, and such payments on the mortgage, are such an acknowledgment and recognition of the debt as will prevent the bar of the statute of limitations. 2. The recognition and acknowledgment of the debt for which suit is brought, by the administrator of the mortgagor, and also by this defendant after he had become the owner of the real estate mortgaged, are such recognitions and acknowledgments and promises to pay the debt as will prevent the bar of the statute of limitations. 3. The debt for which suit is instituted, is not barred by the statute of limitations.

These declarations were objectionable both in form and substance. The cases are very rare in which it is admissible to frame declarations of law for the court, in disregard of the rules which are imperative for instructions given to a jury. In either case, the questions of law and those of fact should

be so separated that it may afterwards be seen by which class the general finding was controlled. When the facts are presented hypothetically, as: "If it appear from the evidence, that," &c., the conclusion of law will naturally follow as independent propositions, capable of being intelligently discussed in the reviewing court. But with the sample here before us, we could never feel certain whether the court meant to reject the assumptions of fact or the suggestions of legal results, or both. From the nature of the testimony and the finding by the court, however, we are permitted to infer that either of the forms of acknowledgment relied on was held to be insufficient in law to entitle the plaintiff to a foreclosure. The evidence was documentary and unquestioned; so that we may fairly determine its interpretation and legal effect, whether treating this as a proceeding at law or in chancery. (*Willi vs. Dryden*, 52 Mo., 319.)

As this could not be treated as a suit upon the bond, the relevancy of an acknowledgment by the administrator of the obligor, to take the case out of the statute, is not apparent. It has been repeatedly held, and is now unquestioned, that a note or bond may be barred by limitation, and yet the mortgage securing it may be enforced against the land. (*Wiswell vs. Baxter*, 20 Wis., 680.) But lest the question appear again in this cause in another shape, it seems not amiss to examine the sufficiency of such an acknowledgment by an administrator, under any circumstances. Touching its competency to defeat the statutory bar, there appears to have been formerly some contrariety among the authorities. Those which sustained it generally found their analogies in English rulings, which wholly fail of application to our law in its present state. As nature abhors a vacuum, so the common law abhors the absence of an absolute ownership, somewhere, in property of whatever description. Hence, by a sort of general intent, the administrator must stand in the shoes of his intestate for almost every purpose affecting the personalty. But with us the duties and powers of executors and administrators are so defined and limited by statutes that no room is

left for any speculative authority. Their office is to protect the interests of creditors and distributees who stand upon their strict legal rights. They can neither discharge out of the estate any assumed obligation which the law would not enforce, nor can they revive one which, by operation of law, has ceased to be enforceable.

In *Bell vs. Morrison*, (1 Pet., 351) and other leading cases, while it is agreed that the suit is properly founded on the original demand, yet the authority to take an indebtedness out of the statute by a new promise or acknowledgment is shown to be dependent upon the *power* to make a *new contract*, "springing out and supported by the original consideration." It is impossible to find any such power conferred, even inferentially, upon executors or administrators in Missouri. It follows that an administrator cannot, by his own promise or acknowledgment, prevent the statute of limitations from running in favor of a debt contracted by his intestate. A *dictum* in *Wiggins vs. Greene*, (9 Mo., 263) was doubtless induced by the learned judge's familiarity with the doctrine then current, as derived from foreign sources.

* There is no sort of propriety in confounding the statute of limitations with the presumption of payment arising from lapse of time. As defenses, the two are wholly distinct in their applications and incidents. When the statute affects a right of action, it operates simply a blight, as it were, upon its recoverable energy. (It matters not in the least, whether the demand has been previously paid or not, the statute destroys forever, upon the last day of the allotted period, its vitality in a court of justice. Hence, if there be not a new contract in the promise or acknowledgment upon which the creditor relies, he has still nothing to stand upon.) But in the other defense, the fact of payment, real or supposed, is the only matter to be considered. The law first presumes payment. An acknowledgment by the debtor merely removes this presumption by furnishing evidence to prove that the debt has not been paid. There is no new contract, express or implied. The recovery must be upon the original demand or nothing.

Our statutes of limitations are directed against a variety of civil remedies by name, class or subject matter, but foreclosure of mortgage is not one of them. Every limitation affecting the recovery of real estate requires an adverse possession to support it. But between mortgagor and mortgagee there is no adverse possession, so long as their original relations continue to subsist. The possession of the one is amicably consistent with all the rights claimed by the other. But it does not follow that a mortgagee may proceed to foreclose after thirty or sixty or more years of quiet possession by the mortgagor. Here the presumption of payment from lapse of time intervenes, for a repose analogous to that which is secured by the limitation laws in other cases.

A mortgagee in possession who, for the period of limitation, refuses to recognize the existence of the mortgage, or any equitable claim in the mortgagor, may stand upon such adverse possession, and, under color of the statute, resist an effort by the mortgagor to enforce his equity of redemption. (*Demorest vs. Wynkoop*, 3 Johns. Ch., 135; *McNair vs. Lot*, 34 Mo., 285.) But the position of the parties being reversed, shall there be no law of reciprocity? A mortgagor in possession for the same period gets no such aid from the statute, but courts of equity have from a very early date adopted the presumption of payment of the mortgage debt by analogy, as arising in his favor after the same duration of time which, under the statute, would arm the mortgagee against him in the instance first mentioned. Twenty years being the period of limitation in nearly every jurisdiction outside of Missouri, that has been also the commonly accepted term which may create the equitable presumption of payment. In Connecticut, where the limitation is fifteen years, it is held that the presumption will arise upon fifteen years' undisturbed possession by the mortgagor, without payment or recognition of the mortgage debt. (*Haskell vs. Bailey*, 22 Conn., 569; *Hughes vs. Edwards*, 9 Wheat., 490.)

Thus, it will be seen that the rights of the parties in this case were not properly measurable by the statute of limita-

tions or its collateral results, but by the equitable presumption of payment arising from lapse of time and its incidental features. If the action had been a personal one, on the original bond, the acknowledgment of indebtedness expressed in the defendant's deed of trust to English would have furnished no answer to his plea of the statute of limitations. For how could a new contract with the plaintiff be discerned in an acknowledgment made to an entire stranger, not in privity nor in any manner connected with him? On the other hand, dealing with this as a proceeding for foreclosure of the mortgage, we have only to consider the question of payment in its aspects of equitable presumption and rebuttal of that presumption.

It is unnecessary to say here, that by analogy with our statute, ten years would suffice to raise the presumption. For more than twenty years appear in the proofs for that purpose, and the acknowledgment in the deed of trust occurred less than ten years before the commencement of the suit. How, then, stands this acknowledgment made to a stranger? As an admission of a fact, against the interest of the party making it, it is just as good in evidence as if made to the plaintiff. It follows that, however insufficient it might be against a plea of the statute of limitations, it may in this proceeding accomplish all that the plaintiff requires for a recovery. It furnishes evidence to show that the debt has not been paid.

A point was made on the fact that the bond had never been allowed against the estate of Harbison, in course of administration. But in so far as this proceeding was for foreclosure against a purchaser, that fact was not material.

The judgment is reversed and the cause remanded; the other judges concur.

Bryant, Adm'r v. Christian, Adm'r.

W. B. BRYANT, Adm'r of MARGARET M. BUFORD, Appellant,
vs. WILLIAM CHRISTIAN, Adm'r of JAMES BUFORD, *et al.*
 Respondent.

1. *Wills—Estate for life with power to devise—Does not convey absolute ownership.*—The devise of an estate for life with authority in the devisee to dispose of the same by last will, does not convey absolute ownership. The right of testamentary disposition is a mere power.
2. *Wills—Estate for life—Power to devise—Will construed.*—A testator bequeathed all his property to his widow, during her natural life, to manage, dispose of and enjoy free from all incumbrance, without giving security as executrix or making annual settlements during her widowhood, and with power to dispose of one-half the estate by last will. In the event of her second marriage, the estate was to be regularly administered upon, so that the widow should be secure in the "income and emoluments of the estate during her life." *Held*, that the manifest intention of the testator was to devise a life estate only, with the usufruct and a testamentary power as to one-half.
3. *Dower—Personal Estate—Election—Death of widow.*—The 5th section of the Dower Act, (Wagn. Stat. 539) does not give to a widow any interest in the personal estate, unless she files her election in conformity with the 8th and 10th sections of the same act. And her death intervening can make no difference in the result.
4. *Dower—Election—Personal estate—Administration.*—The administrator of a widow whose husband had died without leaving a child or other descendant capable of inheriting, and who had filed no election under the 8th and 10th sections of the Dower Act, is not entitled to any distributive share in the personal estate of the husband.

Appeal from Ralls Circuit Court.

Fagg & Dyer, for Appellant.

I. Under the 5th section of the "Dower Act," (Wagn. Stat. p. 539) the widow was entitled absolutely to one-half of the personal estate of her deceased husband, subject only to the payment of his debts, and to vest the title of this property in her it was not necessary that she should file an election. This appears by comparison with other sections. The 8th section of the same act provides, that the widow shall have her election to take her dower, (as provided in the 1st section which has reference alone to real estate) discharged of debts, or, the provisions of the 5th section, subject to debts.

II. The 4th section gives to the widow a child's part in the personal estate of her husband, and to do this requires no

election to be made by her. If there be but one child then she is entitled to half of the estate. Does the 5th section require anything more to be done, where there are no children, than the 4th section where there are children?

III. The statute has no reference to personal property (§ 8), for the wife can have no interest in it until the debts are paid. (Wagn. Stat., §§ 38, 39, p. 88.)

IV. The term "dower" properly refers to the interest of the widow in the real estate of her husband. (Bryant vs. McCune, 49 Mo., 546; Pemberton vs. Pemberton, 29 Mo., 408; Hornsey vs. Casey, 23 Mo., 371; Welch vs. Anderson, 28 Mo., 293; McLaughlin vs. McLaughlin, 16 Mo., 242.)

V. Under the provisions of the will of James Buford, his widow, (and after her death her legal representatives,) is entitled to one-half of the personal estate of which the said James died possessed. The words of the will vested in her an absolute estate, and the words "and bequeath by last will and testament" are not, and were not, intended by the testator as a limitation on her right to the property. (Hazel vs. Hagan, 47 Mo., 280; Green vs. Sutton, 50 Mo., 186; Ruby vs. Barrett, 12 Mo., 7; Jackson vs. Robbins, 16 Johns., 288.)

VI. If the first taker of an estate not expressly declared to be for life, have the right of disposal, he takes a fee and any limitation over is void. (Jackson vs. Brewster, 10 Johns., 19; Ramsdell vs. Ramsdell, 21 Me., 288.)

Henderson & Shields, for Respondent.

I. Plaintiff's declaration that if James Buford died without children or descendants in being, capable of inheriting, subject to the payment of his debts, his widow was entitled to one-half of his personal estate, absolutely, and that the title thereto vested in her without any election by her under the statute, was manifestly incorrect and the court properly rejected the instruction. (Wagn. Stat. [1872], §§ 5, 7, 8, p. 539, and § 10, p. 540; United States vs. Grundy, 3 Cranch., 337; Welch vs. Anderson, 28 Mo., 293-98.)

II. In order to take under the 5th section of the "Dower Act," the widow must file her election as required by the 8th and 10th sections of said act; and unless such election be made she is endowed under the 1st section. (*Hamilton vs. O'Neal*, 9 Mo., 10; *Welch vs. Anderson*, 28 Mo., 293; *Watson vs. Watson*, 28 Mo., 300, 302; *Matney vs. Graham*, 50 Mo., 559-64.)

III. The right of election is purely personal to the widow and does not descend to her representatives, and she having died without making the election, her representatives cannot avail themselves of the privilege in her stead. (*Welch vs. Anderson*, 28 Mo., 293.)

IV. The widow's right to elect being purely statutory must be substantially complied with by her, or no right will accrue to her thereunder. Such statutes being strictly construed. (*Price vs. Woodford*, 43 Mo., 247; *Ewing vs. Ewing*, 44 Mo., 25.)

V. The will shows that the intention of the testator was to simply give her a power of disposition of one-half of the property "by last will and testament" and in no other way, and "at her decease," and at no other time. This was a mere naked power of disposal, which being unexecuted by the widow, does not vest any right in her representatives, and the property reverts to the heirs at law.

This devise is not ambiguous and it means that the widow should take all the estate for life, with power of disposal of one-half by will at her decease, nothing more—nothing less.

LEWIS, Judge, delivered the opinion of the court.

The facts in this case appear in an agreed statement to the following effect: James Buford died on the 14th March, 1870, leaving a widow, Margaret M. Buford, but no children or other descendants. On the 25th of same month, the widow also died. After her death, on April 11th, following, the last will and testament of James Buford was admitted to probate. In July of the same year, letters of administration on the estate of Margaret M. Buford were granted to the plaintiff.



The will of James Buford contained the following provisions. "Item 1st. I will and direct that all my just debts be paid off and discharged. Item 2d. In the event that my beloved wife Margaret M. Buford should be the longest lived, I give and bequeath to her during her natural life all my estate, real and personal, to manage, dispose of and enjoy free from all incumbrance, hereby relieving her from the necessity of giving security to the court, or making annual settlements, or being otherwise subject to costs and charges in managing the same during her widowhood. I also give her full power and authority to dispose of, give and bequeath by last will and testament, the one-half of the estate at her decease, of any kind and description, (except the amount herein named to be given to my former slaves) and, in the event of my wife's surviving me, that she may not, by any casualty or misfortune, be reduced to want, I direct and request that, in the event of her second marriage, my estate shall then be regularly administered upon—the executor appointed being required to give bond and security, that my said wife shall be secure in the income and emoluments of the estate during her life, and that it may be disposed of finally according to this will."

At the expiration of two years after the probate of the will, it appeared that the debts of James Buford's estate were all paid, and there remained in the hands of his administrator about \$9,000 for distribution.

It was admitted that the widow "never filed her election as provided in the 10th section of the Dower Act;" that she "was well acquainted with the contents of the will, and represented herself as being satisfied with its provisions."

Upon this state of facts, the plaintiff applied to the Probate Court for an order of distribution which should appropriate to him, as the representative of Margaret M. Buford, deceased, one-half of the assets of James Buford's estate remaining for distribution. The court refused his application, and, deciding that plaintiff was not entitled to any share in the estate, made an order distributing the balance of assets among the

Bryant, Adm'r v. Christian, Adm'r.

heirs. Plaintiff appealed to the Circuit Court where, after full hearing, the ruling of the Probate Court was affirmed.

The plaintiff asks for a reversal, on two grounds: 1st. That, by the terms of the will, Mrs. Buford acquired an absolute ownership in one-half the estate of her husband, subject only to the exception provided for. (This exception has no practical relevancy to the matter in issue, and need not be elucidated.) 2d. That, even if the will gave her only a life estate, with a power of testamentary disposal as to one-half of the whole, yet, by the 5th section of the Dower Act, (Wagn. Stat., 539) the law invested her absolutely with one-half, and no act of election on her part was necessary to give effect to that investiture.

We do not find these propositions sustained by the statute, or the authorities cited.

1st. In *Rubey vs. Barnett*, (12 Mo., 7) it is held that the devise of "an express estate for life negatives the intention to give the absolute property, and converts the words giving a right of disposition into words of mere power." This rule of construction has always been adhered to by this court. We are referred to several cases which are supposed to illustrate the contrary doctrine. In *Hazel vs. Hagan*, (47 Mo., 277) it was held that the devise of an estate, with the power of disposal would pass the fee. But the learned judge in delivering the opinion, was careful to insert the qualification, "there being no express estate for life limited to the devisee." In *Green vs. Sutton*, (50 Mo., 186) it was decided that "a conveyance, coupled with a distinct and naked power of disposition always carries the fee, unless such conveyance be made by express words to vest an estate for life only." These cases, then, sustain, rather than defeat, the first proposition.

We think the intention of the testator is manifest in the will before us, to bequeath to his widow only a life interest, with the usufruct, in his whole estate. It follows that the words authorizing her testamentary disposal of one-half imply a mere power. As to the other half, which she cannot so dispose of, the assertion of a bare life estate in it, proves itself.

Bryant, Adm'r v. Christian, Adm'r.

And, as both halves come to her in the same general grant, the interest conveyed is the same for either. He bestows the property "during her natural life * * * to manage, dispose of and enjoy free from all incumbrance, etc." He then exonerates her from obligation as to security, annual settlements, etc., during her widowhood. Then with a rare tenderness for the possible wife of a future husband, he provides, in the event of her second marriage, not for any less or different estate, but for the better securing of that which he has already bequeathed. Here his intention appears in unmistakable form, that she is to have the "income and emoluments of the estate during her life, and that it may be disposed of finally, according to this will." It seems impossible to find in such expressions an intention to devise absolute ownership in any thing more than the widow might consume for her own support or enjoyment during life.

2d. The plain language of the statute disposes of the second proposition. The 5th section referred to reads thus: "When the husband shall die without any child or other descendants in being, capable of inheriting, his widow shall be entitled * * * to one-half of the real and personal estate belonging to the husband at the time of his death, absolutely."

An inquiry might here interpose, as to the effect of the bequest itself, whether of an absolute or qualified estate, upon this statutory grant. A well known equitable rule would put the widow to her election between the will and the statute, because of a manifest unfairness in her claiming under both. The 15th and 16th sections of the Dower Act, provide for such an election where real estate is concerned, but they have no application to personal property. Under these provisions, the statutory presumption is in favor of the will, where no election has been made—thus agreeing with the presumptions in other States as to either real or personal property, where similar statutes cover both descriptions. The equitable rule, however, apart from the statute, presumes in favor of neither; and a case may be supposed in which very embarrassing questions might arise in the disposition of

Bryant, Adm'r v. Christian, Adm'r.

personalty, in consequence of the legislative omission to furnish a rule of preponderance. In the precise case now before us, we escape this difficulty, through the 8th, 9th and 10th sections of the act. It will be seen that Mrs. Buford never had any claim to personal property under the statute, and so there was no rivalry to be determined between the latter and the will.

The 8th section is as follows: "§ 8. When the husband shall die without a child or other descendant living, capable of inheriting, the widow shall have her election to take her dower, as provided in the first section, discharged of debts, or the provisions of the 5th section, subject to debts."

The 9th section provides for a notice to be served on the widow, apprising her of her right.

"§ 10. Such election shall be made by declaration in writing, acknowledged before some officer authorized to take the acknowledgment of deeds, and filed in the office of the clerk of the court in which letters testamentary or of administration shall have been granted, within twelve months after grant of the same: otherwise she shall be endowed under the provisions of the first, second and third sections of this chapter."

The first, second and third sections referred to, endow the widow in real estate only.

It thus appears that, unless the widow has filed her election in the form required, the 5th section was not enacted for her benefit. It is admitted that she never did so. She and her personal representative, are therefore expressly excluded from its provisions. The fact of her death intervening cannot break the force of a positive enactment which ignores every such contingency.

The judgment must be affirmed; the other judges concur.

White v. Rush.

JOHN B. WHITE, Respondent, vs. ALEX. W. RUSH, Appellant.

1. *Practice, civil—Ejectment—Pleading—Judgment—Equity.*—In an action in ejectment, where defendant answered alleging that the deed under which plaintiff held was void, having been made upon a sale under the powers of a deed of trust, without sufficient notice being given of the sale as required by the deed; and plaintiff replied to the answer simply denying the new matter and asking no additional relief, the court could do no more than set aside the deed. It had no power to go further and order the payment by the defendant of taxes and the trust debt, or to order a foreclosure and sale in a manner not provided in the deed of trust.

Appeal from Marion Circuit Court.

A. W. Rush, for Appellant.

I. When the court declared that the sale and deed of Thompson to plaintiff were void, it had no power to proceed any further, except to remit the parties to their former *status*, the plaintiff not having asked the relief the court gave him. (Wagn. Stat., p. 999, ch. 110, Art. V, § 3; Am. Law. Reg., vol. 2, p. 721.)

WAGNER, Judge, delivered the opinion of the court.

Plaintiff commenced his action in ejectment to recover the possession of certain real estate set out and described in the petition.

The defendant, in his answer, denied the allegations in the petition, and set up as new matter, as an equitable defense, that the deed under which plaintiff claimed title was void; that the deed was executed by one Thos. E. Thompson by virtue of a sale made under a deed of trust executed by defendant and wife to Thompson as trustee to secure the payment of a debt owing by defendant to plaintiff; that the deed required that the trustee should give at least twenty days' notice of the time, terms and place of sale, and that only fifteen days' notice was given by the trustee. The answer then prayed that the sale and deed made by the trustee to plaintiff might be set aside, and for naught held and esteemed.

The replication was a denial of the new matter set up in the petition, and averred that the trustee complied with the

terms of the deed in making the sale; but no new or additional relief was asked. Upon the issues thus framed, the case was submitted to the determination of the court.

The evidence clearly sustained the averment in the answer, and showed that the trustee, in executing the power, only gave fifteen days' notice of the time of sale, when the deed directly required twenty days' notice. The court so found and rendered its decree declaring the sale illegal and void, and that it passed no title.

The court then proceeded further and found that the plaintiff had paid certain taxes on the property after he purchased the same at trustee's sale, and that the defendant had not refunded them, nor had he paid any part of the note or interest which was due the plaintiff, and which was secured by a deed of trust. It therefore ordered, adjudged and decreed, that the deed be set aside, that the defendant have till a day therein prescribed, to pay the plaintiff the full amount of the note and interest, and all taxes paid by the plaintiff, and the costs which had accrued in this suit; and in default of such payment within the limited time, then the sheriff was authorized and directed to sell the property in the same manner as required by law for the sale of real estate, and the proceeds of the sale were to be applied and distributed as was in the decree set forth. From this judgment the defendant appealed.

After the court had found that the sale was void, and had set aside the deed, there was no issue in the case made by the pleadings warranting any further action or judgment.

Not only did the court put the defendant upon terms, but it went further and rendered a judgment of foreclosure and provided for a sale in a manner entirely different from that contained in the deed of trust.

In rendering a judgment, the court is not confined to the relief prayed for in the petition. It may very properly give judgment for anything consistent with the issues made by the pleadings and sustained by the proofs in the case, whether the same is asked for or not. But it cannot go entirely outside of the case for matters upon which to found its judgment.

Shaw v. Besch.

Had the defendant brought his petition to redeem on the ground that the sale was illegal, or had he taken that position in his answer, then the court might have granted the request and imposed the terms that it did, on the familiar principle that he who asks equity must do equity; or had the plaintiff sought such relief, even in his replication, the court would have been justified in granting it. But, as the case stands, there was simply a petition in ejectment, seeking the recovery of lands. The answer put the right of possession in issue on the ground that the plaintiff had no valid title, and this the court found to be true. After this finding and the setting aside of the deed, there was nothing in the pleadings justifying any further action than a simple judgment for the defendant.

The point urged by the defendant, that there was a non-joinder of parties because his wife was not included as a defendant, is not well taken. She had nothing but a dower interest; that was relinquished, and there was no necessity for making her a party.

The judgment must be reversed and the cause remanded; the other judges concur.

— o —

WILLIAM SHAW, Defendant in Error, vs. PHILLIP BESCH,
Plaintiff in Error.

1. *Practice, civil—New trial—Newly discovered evidence.*—A new trial on the ground of newly discovered evidence should not be granted unless it is shown that proper diligence was used before the trial, and that the newly discovered evidence would probably have changed the result.

Error to St. Francois Circuit Court.

M. L. Clardy & John F. Bush, for Plaintiff in Error.

J. B. Robinson, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

The only ground insisted upon in this court for a reversal of the judgment is the refusal to grant a new trial on account of newly discovered evidence.

The action was for the value of a mare alleged to have been killed by the defendant, and on a trial before the court sitting as a jury a verdict for ninety dollars was found in favor of the plaintiff.

The verdict was well supported by the evidence. The defendant moved for a new trial on the ground of newly discovered evidence, but the court overruled the motion.

We have examined the motion and the affidavits submitted therewith, and are satisfied that the court committed no error in its ruling. The affidavit does not show that the proper diligence was used before the trial, and if the testimony relied on as newly discovered had been submitted it would not have produced a different result; and where such is the case a new trial will not be granted. (*State vs. Locke*, 26 Mo., 603; *Howell vs. Howell*, 37 Mo., 125.)

The plaintiff's witnesses on the trial identified the mare as a sorrel mare, and the affidavit stated that the proposed witnesses would swear that she was a dark or chestnut sorrel.

The verdict was for ninety dollars and it was stated that it could be shown by the newly discovered evidence that the mare was only worth from fifty to sixty dollars, and that she was not the property of the plaintiff. But the plaintiff remitted thirty dollars of the verdict and left the judgment for sixty dollars, which was about the valuation placed upon the mare by the proposed testimony.

It is certain that this evidence, had it been produced on the trial, could not have changed the verdict. Besides the identity, the value and the ownership of the mare were all involved in the issues, and the evidence at best was merely cumulative.

The judgment was right and should be affirmed; the other judges concur.

Wood v. St. L., K. C. & N. R. R. Co.

ZACHARY WOOD, guardian of FORTUNATUS L. WOOD, Respondent, vs. ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY COMPANY, Appellant.

1. *Justices' courts—Statement—Sufficiency.*—No technical pleadings are required to be filed in a justice's court, and though the statement filed may not show in direct terms the facts necessary as a foundation for the action, yet if they are inferable from the statement, this will be sufficient, at least after verdict.
2. *Continuance—Affidavit—Diligence.*—An affidavit for a continuance on account of the absence of a material witness, must not only show the facts of his absence and materiality, but also that due diligence has been used to secure his testimony.
3. *Damages—Railroad—Killing of stock—Practice—Verdict.*—In proceedings against a railroad for double damages for the killing of stock under § 43, Wagn. Stat., 310, the proper practice is for the jury to find a verdict for single damages only, and the court may then render judgment for double damages.
4. *Railroads—Killing stock—Single and double damages.*—An action for damages for killing of stock cannot be brought under both the forty-third section of the Railroad Law, (Wagn. Stat., 317,) and the fifth section of the Damage Act, (Wagn. Stat., 520). Such action must be brought under only one of them, and should be tried under the one which applies to the facts of the case as made by the petition and evidence; and instructions which leave it uncertain, under which act they are to proceed in estimating damages, tend to confuse and mislead the jury, and are improper.

Appeal from St. Charles Circuit Court.

W. Blodgett & M. M'Keag, for Appellant.

John A. Keelar & John B. Allen, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace, in Cuivre township in St. Charles county.

The action was founded on the 43rd section of the act concerning "Railroad Companies." (1 Wagn. Stat., 310.)

The cause of action filed before the justice was substantially as follows: "That on the 30th day of May, 1873, the plaintiff was the owner of two horses and one mule colt; that one of the horses was of the value of one hundred and ten dollars, and the other of the value of one hundred and twenty-five dollars, and the mule colt of the value of forty dollars;

that the defendant being the owner of the locomotive and cars used on the railroad of defendant, did negligently and wilfully, by its agents and servants, run over said horses and mule in said township, near a railroad crossing and at a place where said railroad passes through, along and adjoining inclosed and cultivated fields and prairie lands; that the defendant failed to construct and maintain cattle guards and fences at the place where the said animals got on the track of said road, and where the two horses were killed and the mule injured; that in consequence of such failure, the animals came upon the track of said road and the horses were killed by the locomotive and cars of the defendant, and the mule was thereby injured, by which plaintiff was damaged in the sum of two hundred and sixty-five dollars; that the defendant is liable, by the laws of this State, to pay the plaintiff double the amount of the damage so done, to-wit: the sum of five hundred and thirty dollars, for which sum judgment is prayed.

The plaintiff recovered a judgment before the justice for double damages. From this judgment the defendant appealed to the St. Charles Circuit Court. The parties afterwards appeared in the Circuit Court at the time set for the trial of the case, when the defendant made an application for a continuance of the cause, which said application was supported by the following affidavit, to-wit: "Maurice McKeag, attorney for the defendant, makes application for a continuance for the following reasons: 1st—because this is the first term of this court since the appeal was taken, and although notice had been given to the appellee in writing, as required by law, the appellee failed to enter his appearance as required by law; 2nd—because James Smyth who is an important and material witness for the defendant is absent; that the defendant is unable to procure the testimony of said Smyth; that he is not absent through the procurement or connivance of the defendant; that he does not know of any witness by whom he can prove the same facts; that he had not a subpoena issued for said witness, as upon inquiry he ascertained

he is in New York; that he expects to find him or have his deposition before the next term of the court; that he cannot safely go to trial without said witness' testimony as he believes that it is material; that the fact of his absence was not known in time to have his deposition to use in said cause."

This affidavit was subscribed and sworn to by the defendant's attorney, McKeag. The application for a continuance was heard and overruled by the court, to which the defendant excepted.

A trial was had before a jury. The evidence tended to prove facts sufficient to authorize a recovery by the plaintiff. At the close of the evidence the court upon its own motion instructed the jury as follows:

"To entitle the plaintiff to recover, it must be shown to the satisfaction of the jury that the horses and mule belonged to the plaintiff at the time of the killing; that they were killed by the defendant's locomotive machinery, and on a part of the railroad track which passed through cultivated or inclosed fields, and that the horses got on the track in consequence of defective fencing or cattle guards; and if the evidence shows that the killing was at a public crossing, then there can be no recovery. The measure of damages in the event of recovery is double the actual value of the property at the time of the killing."

The defendant objected to the foregoing instruction and excepted.

The court then, at the request of the plaintiff, gave the jury the following instructions:

"1st.—When any animal or animals shall be killed or injured by the cars, locomotives or carriages used on any railroad in this State, the owner of such animal or animals may recover the value thereof, in an action against the company or corporation running such railroad, without any proof of negligence, unskillfulness or misconduct on the part of the officers, servants or agents of such company, unless the accident complained of occurred on a portion of said road that may be inclosed by a lawful fence or in the crossing of a public highway.

2nd.—That it is the duty of the company or corporation to erect and maintain good and substantial fences at least five feet high on the sides of its road where the same passes through, along, or adjoining inclosed or cultivated fields or prairie lands, with openings and gates and bars therein, and farm crossings of the road for the use of the proprietors or owners of the lands adjoining such railroads, and also to construct and maintain cattle guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, mules and all other animals from getting on the railroad. Until such fences, openings and gates or bars, farm crossings or cattle guards shall be duly made and maintained, such corporation shall be liable in double the amount for all damages which shall be done by its agents, engines or cars, to horses, cattle, mules or other animals, on said road, or by reason of any horses, cattle, mules or other animals coming upon said lands, fields or inclosures, occasioned in either case by the failure to construct, or maintain such fences or cattle guards."

The defendant also objected to the last two instructions, and his objection being overruled he excepted.

The defendant then moved the court to instruct the jury as follows: "The court instructs the jury, 1st—that before they can find for the plaintiff they must find that at the time of the killing of the stock mentioned in plaintiff's petition, the plaintiff was the owner of said stock; 2nd—that the defendant was then a corporation in existence, and that the stock was killed by defendant's cars, locomotives or other carriages; 3rd—that plaintiff's stock was not struck in the public crossing; and 4th—that at the place they got on the track, if they got there, it was through the absence of cattle guards or fences."

This instruction being refused by the court the defendant excepted. The jury returned a verdict in favor of the plaintiff for four hundred and ten dollars, for which amount judgment was rendered by the court.

The defendant filed its several motions for a new trial and in arrest of the judgment, which being severally overruled

by the court, the defendant again excepted and appealed to this court.

The first point raised by the defendant in this court, is, that the statement filed by the plaintiff before the justice as a cause of action failed to state any cause of action upon which a recovery could be had.

We think that the cause of action was substantially good, as no technical pleadings are required to be filed in a justice's court. It is true that the statement fails to state in direct terms that the place on the road where the stock were killed, was not at a public road crossing, but it is inferable from the statements made; and this under our liberal practice, would be sufficient, after verdict, at least, in an action commenced before a justice of the peace.

The next error assigned is, that the Circuit Court erred in overruling the defendant's application for a continuance of the cause. The affidavit for a continuance is very informal, and although it states that the absent witness is in New York, and that the defendant had not ascertained that the witness was absent, until it was too late to take his deposition in time to be used on the trial; yet the affidavit fails to show at what time the facts were actually ascertained, or at what time the witness actually left or that any effort had been made to obtain the attendance of the witness at any time before the day of trial. For all that is stated in the affidavit, a subpoena would have secured the attendance of the witness if issued and served a few days before the day of trial. No facts are stated from which the court could see that any diligence had been used to obtain the presence of the witness or his evidence. We cannot say that the court abused its discretion in overruling the defendant's application for a continuance of the case.

It is next objected, that the court improperly instructed the jury of its own motion and at the request of the plaintiff, and improperly refused to instruct the jury as asked for by the defendant.

I see no objection to the instructions given by the court upon its own motion, except that the jury are instructed that the measure of damages, in the event of a recovery, is double the market value of the property at the time of the killing.

It has been frequently held by this court that in actions to recover treble damages under our statute concerning trespass, an instruction telling the jury that they should find treble damages was improper; that in such cases the jury should only find single damages, and that it was for the court to treble the damages if it was warranted to do so by the evidence. (*Walther vs. Warren*, 26 Mo., 143; *Brewster vs. Link*, 28 Mo., 147.)

That statute is, however, different from the statute under which this action is brought. The 4th section of the statute, concerning trespasses, provides, that if on the trial of any action brought upon the statute, it shall appear that the defendant had probable cause to believe that the land on which the trespass was committed, etc., was his own, the plaintiff shall receive only single damages and costs. It is held in the cases above referred to, that the jury should be instructed to find single damages only, and that it was for the court to treble the damages if it did not appear that the defendant had reasonable cause to believe that the property upon which the trespass had been committed was his own. In other words, that the question, whether the defendant had such reasonable cause to believe that the property upon which the trespass was committed was his own, was a question for the court and not for the jury.

The statute under which this action is brought has no provision authorizing a verdict and judgment for single damages, where the facts proved fail to make out a case for double damages. The fifth section of the act concerning "Damages and Contributions in Actions of Tort," (*Wagn. Stat.*, 520.) furnishes a remedy for single damages for killing of stock by railroad companies. It may be doubted whether the same rule for the assessment of damages, in cases arising under the trespass act, would apply to actions brought under the 43rd

section of the Railroad Act ; but the practice, so far as I know, has been for the court to instruct the jury to find single damages only, after which the court renders a judgment for double the damages found, and we think that this is the best practice and should be followed, although we might not reverse this judgment for that irregularity in the first instruction, if there were no other errors in the case.

The two instructions given by the court at the request of the plaintiff are, however, subject to a more serious objection. The first of these instructions is founded on the fifth section of the act concerning Damages and Contributions before referred to, which authorizes a recovery of single damages against railroad companies for an injury to stock upon their railroads, without any proof of negligence, if the stock is injured at a point on the road where it is not fenced ; and this, whether the stock is injured at a point on the road where it is required to be fenced or not, except in places where it is wholly impracticable that the road should be fenced.

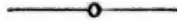
The second of these instructions seems to be founded on the 43rd section of the railroad law, where double damages may be recovered, if the injury takes place where the road is required by law to be fenced but is not fenced, etc., and which is the act under which this action is brought.

It is beyond any reasonable comprehension to see how it was thought to be proper to give these two instructions in the same case. The action could not be brought under both of these acts. It must have been brought under one or the other of the acts and ought to be tried under the act to which the facts of the case, as made in the petition and evidence, peculiarly apply.

To give instructions applicable to an act which could have nothing to do with the case made by the petition and evidence, and under which only single damages are recoverable, and at the same time to instruct the jury that they should find double damages if they should find that another state of facts existed, is, to say the least of it, calculated to confuse and mislead the jury ; and although we may not be able to say

that the jury were really misled in this case, they may have been misled, and we do not think that it would be promotive of the ends of justice to tolerate such a loose and irregular practice in the trial courts of the country.

The judgment will be reversed and the cause remanded; the other judges concur.



COLUMBUS T. RICE, Respondent, *vs.* JOHN C. McCLELLAND, *et al.*, Directors Sub-District, No. 3, Township 63, Range 14; and SIMON RORобаUGH, *et al.*, Directors Sub-District No. 5, Township 63, Range 14, Appellants.

1. *Schools—District—Organization—Evidence.*—The fact that a school district has in fact been organized and conducting business for a period of thirteen years is sufficient to show a legal existence without resort to record evidence of their organization; particularly where the question involved is the disposition of funds collected under acts officially performed by the directors of such district.
2. *Schools—Township Board—Irregularities.*—Proceedings of township boards of education will not be treated as void and set aside in collateral proceedings for mere irregularities which do not affect the substantial rights of the parties. Their actions will be upheld when good faith has been exercised, unless in very glaring cases of wrong, or when direct proceedings are instituted at the time to set their action aside.
3. *Schools—Taxes—Sub-districts, division of—Distribution of funds.*—A tax was assessed and levied by the directors of a certain school district numbered 3 for the erection of a school house. Before the tax was collected and paid over, the district was sub-divided, and a new district created out of a part which was designated as No. 5. A controversy arose as to the disposal of said taxes. *Held*, that under § 99, of the School Law, (Wagn. Stat., 1261) the money could be paid out only for the purpose for which it was levied and collected, and the township board had no right to apportion money collected for the erection of a school house in one sub-district between the two new districts. Any apparent injustice in such exclusive application to a part of the original district of the funds arising from taxation of the whole could be remedied under the provision of § 25 of the same act.

Rice v. McClelland, et al.

Appeal from Adair Circuit Court.

Harrington & Cover, for Appellants, cited : *School Directors vs. Miller*, 43 Ills., 494 : *Potter vs. Chapin*, 6 Paige, 639.

Ellison & Ellison, for Respondent, cited : *Com. of Crawford Co. vs. Com. Marion Co.*, 16 Ohio, 466.

VORIES, Judge, delivered the opinion of the court.

This was a proceeding commenced in the Adair Circuit Court, the object of which was to compel the two sets of school directors who are named as defendants, to interplead in the cause and have their respective rights settled to certain funds then in the possession of the plaintiff as township clerk, etc.

The best statement of the case that can be made is to copy the petition filed by the plaintiff which gives a detailed statement of the whole facts in the case, and is as follows :

"Plaintiff represents to the Hon. Circuit Court aforesaid, that he is the township clerk of townships Nos. 63 and 64, of Range 14, and that prior to the 16th day of Oct., 1871, Township No. 63, Range 14, was sub-divided into four sub-districts numbered one, two, three and four, and the boundaries of each sub-district fixed as the law provides. That while said township was thus sub-divided into four districts, the local directors for sub-district No. 3 in pursuance of section 6, of the present school law, determined to erect a school-house for said sub-district, and for that purpose returned to the township clerk an estimate of \$600 to be assessed upon and collected from the taxable property of said sub-district No. 3 ; also the sum of \$25, for a school house site, and \$20 for furniture for said school, and ten dollars for fuel, was appropriated and estimated for, making in all for said house, site, furniture and fuel the sum of \$655 ; all of which will more fully appear from the records of said sub-district, a copy of which is herewith filed marked "A ;" and that there is now and was before the 16th day of Oct., 1871, in his hands for said sub-district No. 3, the sum of \$149.25, and that there will

presently come into his hands the township and county funds heretofore estimated for said sub-district No. 3, before said 16th day of Oct., 1871. That on the 3rd Saturday of Sept., 1871, three of the six members of the board of education for Townships 63 and 64, of Range 14, met and there being no quorum the three present adjourned to the 15th of Oct., 1871, as appears by the record, a copy of which is herewith filed, marked "B," and a few days after said adjournment it was discovered that the 15th day of Oct., 1871, came on the first day of the week commonly called Sunday, and the time for meeting was changed from the 15th to the 16th day of October, 1871, by petition or order of change signed by five of the six members of the board of education, as will appear from a copy of the record filed, marked "C."

That on the 16th day of Oct., 1871, said board of education met and considered the question of dividing said sub-district No. 3, so as to make what is called Floyd's creek the line between said sub-districts.

That a petition asking said division was presented to said board signed by twenty-six persons residents of said district, and a remonstrance with twenty-six persons residents of said district protesting against said division. That upon consideration of the matter by said board it was ordered that said sub-district No. 3, be divided as prayed for in said petition

* * * making two sub-districts out of the former territory of No. 3, the said new sub-district being numbered 5, and the lines and boundaries of both 3 and 5 being fixed by said board on said 16th day of Oct., 1871; and that afterwards the defendants Simon Rorobaugh, James B. Leighton and Benj. D. Currence were appointed directors for said sub-district No. 5, and that sub-district No. 3, retained the same number; and the defendants John C. McClelland, Charles Beardslee and Charles Hoag, are the directors of sub-district No. 3. That afterwards the question arose as to the disposition of all the funds held by the plaintiff as such clerk as aforesaid * * * and a controversy was gotten up between said sub-districts as to how and to whom said funds

Rice v. McClelland, et al.

should be disbursed by the plaintiff, and a special meeting of said township board was had on the 25th day of Nov., 1871, and an order made by them dividing said funds between said sub-districts and ordering the plaintiff to pay the same out as follows, to-wit: The funds for a school house site, furniture and fuel raised by taxation, should be paid to each of said sub-districts from the taxes on property within the present limits of said districts; that is, all collections made within the present limits of district No. 3, should be paid out on orders from their school directors, and all the taxes on said estimates collected within the territory of said sub-district No. 5, should be paid out on orders from its local directors, and that the other funds should be divided between said sub-districts Nos. 3 and 5, in the ratio that the scholars in said districts should bear to each other as shown by the enumerations; and that sub-district No. 5, expressed itself satisfied with the action of the board; but that sub-district No. 3, is not satisfied and threatens to sue plaintiff if he pays any of the funds aforesaid to sub-district No. 5, and that sub-district No. 5, threatens to sue plaintiff to compel him to pay as said board ordered and directed him at said meeting last aforesaid. Your petitioner says he is not learned in the law, and that each of said sub-districts have and do raise objections as to the legality and force of the action of the other, and objections are raised as to the various acts and doings of the board of education aforesaid in the premises. Your petitioner says that he is a trustee for the funds aforesaid, and that he has been placed in such circumstances as to raise a reasonable doubt as to how he shall dispose of said funds and to whom, etc. Therefore he asks the court to adjudge and determine how, and to whom, and on whose order said funds shall be disbursed, and to direct how he shall disburse said funds and that he may be allowed a reasonable compensation for his time and trouble, etc., and have such other relief, etc."

The two boards of directors, made defendants in the petition, appeared in court and each board made a separate answer. The directors of district No. 3, insisted that said dis-

trict was entitled to all of the money levied or collected on estimates made for the use of said district previous to the formation of district No. 5.

The directors representing district No. 5 insisted that, as the money in the hands of the plaintiff had been collected from all of the inhabitants of both districts previous to the sub-division of district No. 3, into two districts, and the same had not been distributed or disbursed by plaintiff previous to the division of district No. 3 and the establishment of district No. 5, the order made by the township board to divide the funds so in the plaintiff's hands was properly made and that plaintiff should be ordered to pay out the money on the order of the respective boards of directors accordingly.

The evidence substantially sustains all of the facts stated in the plaintiff's petition. When the evidence was introduced the board of directors representing district No. 5, objected to all evidence in the case until the records should be produced, showing the establishment of district No. 3 by the township board of education. The objection was overruled and this ruling is one of the grounds of exceptions taken in the case.

The court found in favor of the board of directors representing district No. 3, and ordered the plaintiff to pay out and disburse the money named in the petition upon orders therefor made by the directors of said district.

The directors representing district No. 5, filed a motion for a rehearing which being overruled they appealed to this court.

There were a number of declarations of law asked at the close of the evidence in the case, but as they only raise the questions of law naturally arising out of the facts as they appear in the petition, it becomes wholly unnecessary to notice them in a special manner in coming to a conclusion in the investigation of the case.

It is first insisted by the local directors of school district numbered 5, that the court erred in permitting the record of the township board of education to be read in evidence until record evidence was produced showing the organization of

sub-district numbered three. The evidence shows that this sub-district had been organized, conducting business of every kind pertaining to such an organization for thirteen years. This we think was sufficient to show that such a district existed in fact, without showing their organization by record evidence; particularly in a proceeding of this kind where both parties claim money from the township clerk which had been levied and collected upon estimates furnished by the directors of said sub-district.

It is insisted on the part of district No. 3, that the township board of education had no power to divide said district and form district No. 5, out of a part of the territory formerly belonging to district No. 3, for the reason that the general meeting of the township board was not properly adjourned to the 16th day of Oct., the day on which the order was made forming the new district; that the adjournment of the board was to the 15th of Oct., which was Sunday, and that the members of the board after the adjournment had no right to change the time of meeting; that the meeting was therefore an irregular and special meeting, and that by the law no change in the sub-districts could be made except at a general meeting of the board provided for by law. And that, therefore, the action of the board on said subject was void and the directors of the district No. 3, still have control of the whole district as originally formed. That question with the view which we have taken of this case is rendered immaterial so far as this case is concerned. But the evidence in the case shows that all of the parties interested in the matter were present at the meeting on the 16th of Oct., and after the whole matter was discussed before the board the new district was established, and that afterwards directors were elected in the new district, all parties acquiescing in the action of the township board until a difficulty arose over the ownership of the money in the hands of the township clerk. There is no doubt that the action of the township board was irregular; but if all of their proceedings which are had in good faith can be set aside and treated as void in collateral proceedings, for

irregularities which do not affect the substantial rights of the parties interested, the whole beneficial objects of our school system will be paralyzed and rendered inefficient. The schools must necessarily in many townships be conducted by men not accustomed to legal certainty and forms, and their action should be upheld when good faith has been exercised unless it is in very glaring cases of wrong, or where direct proceedings are instituted at the time to set their action aside.

The only real question going to the merits of this case is, as to whom the money belonged that was levied on estimates made by the directors of sub-district numbered three before it was divided and district No. 5, formed. The 6th section of our school law provides that "the local directors shall have power to erect, when they may deem necessary, a suitable school house in their sub-district, returning an estimate for this purpose to the township clerk which shall be assessed upon and collected from the taxable property in said sub-district, in the same manner as other estimates for school purposes, but no estimates for building purposes shall exceed two per cent. of said taxable property, unless a greater per cent. shall be ordered by a majority of the voters, etc." (Wagn. Stat., (1872) p. 1243.)

In the case under consideration the estimate necessary to erect a school house in sub-district numbered three, had been returned by the directors and the tax levied in conformity to the law for said purpose, before any attempt was made to divide the district and create sub-district numbered 5 out of a part of the territory included in No. 3. The amount thus collected when the same should be paid to the township clerk, would be held by him subject to be disbursed upon the order of the directors of district numbered three for the purpose for which it was collected.

The 99th section of the school law, (Wagn. Stat. [2nd. Ed.], p. 1261) provides that "all moneys arising from the taxation shall be paid out only for the purpose for which they were levied and collected; but the income from the State and township funds shall be applied only for the payment of wages of teachers." It will be seen from this last section that no

discretion is left in the township board in the matter; the money shall be paid out only for the purpose for which it was levied and collected.

It follows that the township board had no right to divide and apportion the money, collected for the purpose of the erection of a school house in one sub-district, between that district and another formed out of a part of the territory included in the original district. It is objected that it would be inequitable to permit the money collected from the tax-payers of a whole district, previous to the sub-division of its territory, to be applied to the exclusive use of a part of said tax-payers who should happen to remain in the old district. This difficulty was foreseen by the legislature, and to remedy it the 25th section of the school law was enacted which provides that "whenever it shall become necessary to build and furnish a school house in any sub-district, the inhabitants of which heretofore paid a tax for the building of school houses in other sub-districts in the township, in which such sub-district shall lie, and have not received the benefit of the same, it shall be the duty of the township board of education on receiving notice of such fact to make an estimate of such amount as shall be just and equitable, and cause the same to be assessed upon and collected from the taxable property of the township in the same manner as other estimates, and when so collected it shall be held for the use of such sub-district subject to the order of the directors thereof."

This section provides a manner in which the township board could have done justice to the new district without taking the fund that had been collected to build a school house in district No. 3, and dividing the same between the two districts, neither having enough money for the erection of a house. The legislature preferred that each district should have a house and authorized the township board to provide the means to erect a school house for the new district at the expense of the entire township.

We think that the Circuit Court committed no error in its judgment in the case and its judgment will be affirmed; the other judges concur.

ELVAN ALLEN, Jr., Respondent, *vs.* SARAH E. CLAYBROOK, *et al.*, Appellants.

1. *Will*—*Fund left in trust to wife and children*—*Land purchased with*—*Title of wife in.*—A will directed the executor to secure a certain fund "for the benefit of Jane Allen and her children, and not to be subject to the control of her present husband." The fund was afterward invested by trustee in certain lands which were conveyed by him to "said Jane Allen and her children to their only proper use, benefit and behoof forever, etc." *Held*, that under the will and deed, Mrs. Allen had no power to dispose of the property, and hence took no absolute and exclusive title to the land, but merely an estate in common with her children; and that she could convey nothing more than her undivided share.
2. *Wills*—*Children described in as a class, etc.*—Where in a will, children are designated as a class, without further description, the general rule is that it will include all who answer the description at the time the will took effect.

Appeal from Adair Circuit Court.

DeFrance & Halliburton, for Appellants.

I. The deed of Jane Allen to Mrs. Claybrook conveyed the entire land involved in this suit. The doctrine held in 2 Redf. Wills, [1st. Ed.,] pp. 380-381, § 6, is, that a gift to one and the "issue" or children, etc. etc., is an absolute gift to the person named, and that the words "issue," etc. etc., were to be construed as words of limitation and not a purchase. (See also *Id.*, pp. 360, 363, 384-385.)

II. A bequest of the residue of an estate is to be regarded as personalty. (*Durour vs. Motteaux*, 1 Ves., 320-1.) The trust being money, the fact that it was invested in land while Mrs. Allen was a *feme covert*, by the trustee, does not prevent the land being treated as money. The donation was money, and was only hampered for the purpose of preventing her husband wasting it.

Ellison & Ellison, for Respondent.

I. The deed from Gatewood, trustee, to Jane Allen and her children, made them tenants in common of the land described therein. (2 Washb., 275; 53 Mo., 334.) Hence, Jane Allen could not convey the exclusive and entire title to the land.

Allen v. Claybrook, et al.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment, brought for the recovery of the possession of one undivided eighth part of the east half of the south-west fourth and the south-east quarter of section thirty-two, and the west half of the south-west quarter of section thirty-four, all in township sixty-four and range seventeen, in Adair county, Missouri.

The petition is in the usual form. The answer of the defendants first denies the facts stated in the petition, and then by way of special defense, sets up title in the defendant, Sarah E. Claybrook, and as to one quarter section of the land the defendant relied on the statute of limitations. The plaintiff replied, putting in issue the new matter set up in the answer.

The facts of the case as they appear in the bill of exceptions are about as follows: Both parties claim the land in controversy under the will of one Jane Menx, who died in the State of Kentucky. The clause of the will under which the parties claim, and the only clause in the will which could affect the rights of the parties is as follows:

"Item 11. It is my will that after defraying the above mentioned bequests and appropriations, if there be any of my estate remaining, that my executors secure the one-half thereof, by trust or otherwise, for the benefit of my niece, Mrs. Jane Allen, daughter of my sister Gatewood, (who is said to be in destitute circumstances) and her children, and not to be subject to the control of her present husband."

The plaintiff and the defendant, Sarah E. Claybrook, who is the wife of her co-defendant, are children of Mrs. Jane Allen, the niece named in the will. It is admitted that Jane Allen died long before the commencement of this suit.

After the execution of the will by Mrs. Menx she died. A trustee was appointed to receive and hold the bequest named in the clause of the will before set forth, in trust for said Jane Allen and her children. After the appointment of the trustee, the executor of the estate of Jane Menx, under the provision of the will aforesaid, paid over to Richard Gate-

wood, (the trustee) the sum of \$1,200. After Gatewood had received this sum of money to hold for the use of the said Jane Allen and her children, he came to the State of Missouri, and with said money entered about eight hundred acres of land from the United States, and procured the title thereto in his own name, which said land so entered included the land now in controversy. After the lands had been entered by Gatewood on the third day of October, 1852, Gatewood, the trustee, executed a deed or instrument by which he recited or referred to his appointment as trustee, the receipt by him of the sum of \$1,200, as such trustee; the investment of the money in the lands, (describing the lands,) and by which he conveyed and releases his title to the lands to the said Jane Allen and her children. The language used in the deed is, "to have and to hold said tract of lands with the appurtenances, unto the said Jane Allen and her children to their only proper use, benefit and behoof forever,

* * * I relinquish all my right and title to the above lands. In testimony, etc."

Subsequent to the execution of this deed, Mrs. Jane Allen obtained a divorce from her husband, after which, for some years, she resided with her children, sometimes with the defendants, who were residing on a part of the lands now in controversy, where she died. Shortly before the death of Mrs. Jane Allen, on the 31st day of Oct., 1871, she, by deed of that date, conveyed to defendant, Sarah E. Claybrook, the lands described in the plaintiff's petition. The consideration named in the deed being two hundred dollars as well as services rendered to the grantor by the defendants. It is by virtue of this last deed that the defendants claim to hold the entirety of the title to the land in controversy, as well as by the statute of limitations as to 160 acres of the land. The defendants also offered in evidence a tax deed to the land; but it was only insisted on as a color of title in support of the plea of the statute of limitations.

The defendant, James E. Claybrook, also insists as a ground of defense to the action, as to one quarter section of the land

Allen v. Claybrook, et al.

in controversy, that at and before the time that the lands were entered at the United States land office, he was residing upon, and had improvements on said quarter of land, and that he was entitled to enter the same under and by virtue of the laws of the United States; that the said Gatewood, (trustee) proposed to the defendant, James H. Claybrook, that if he would relinquish his pre-emption right to said land and permit said Gatewood to enter the same, that he, said Gatewood, would procure or cause the said quarter section of land to be conveyed to said defendant; that said defendant did, in pursuance of such request and proposition of Gatewood, relinquish his pre-emption right to said land and permit said Gatewood to enter the same as aforesaid; that after the land was so entered, Gatewood still promised to cause the land to be conveyed to the said defendant, and that the defendant had held the possession of said land under said agreement, claiming the same as his own, for more than ten years before the bringing of this suit. It was insisted, on the other hand, that defendant had relinquished his pre-emption to the land, in consideration that he should be permitted to remain on the land, and to cultivate the same without rent, until a division of the land should be made. Upon this question, the evidence was conflicting. The court excluded the deed from Jane Allen to Sarah E. Claybrook, purporting to convey the land in controversy to said defendant, Sarah E. Claybrook, because it was immaterial for the purpose of showing any title in the defendant to the interest claimed by plaintiff in the land. To the exclusion of this evidence, the defendants excepted. The court then admitted said deed in evidence, as showing color of title in support of the statute of limitations.

It was admitted by the parties that the plaintiff is one of the children of Jane Allen, and was in existence when the will of Jane Menx was made, and at her death; that Jane Allen had nine children in addition to the plaintiff, two of whom died before the death of their mother, without children, and that two died before the death of their mother, leaving

children; and that the father of Jane's children was still living. It was also agreed by the parties that the land was entered by Gatewood in December, 1849. At the close of the evidence the court of its own motion instructed the jury as follows:

"1st.—If the jury find from the evidence, that the defendants were in possession of 160 acres of land at the time it was entered by Gatewood, and that Gatewood, prior to his entry, agreed with James H. Claybrook, that if he would consent to the entry of this land by Gatewood, he would hold it for him, and from that time continuously until the commencement of this suit, defendants continued in possession of that part they were occupying as aforesaid, and claiming the whole tract as their own land, adversely to Mrs. Allen and her children, the verdict of the jury as to that 160 acres should be for defendants."

"2nd.—By continuous possession, is not meant that defendants should have lived on the premises continuously; but that they should have had an actual possession of this land, and not abandoned it with the purpose of yielding up the possession to whoever might choose to take."

"3rd.—Although the jury may find from the evidence that defendants were in possession of said 160 acres at the time of the entry, claiming a pre-emption right to the same, yet, if they find that the agreement with Gatewood was, that Gatewood might enter the land, and that defendants should hold it free of rent until the land entered by Gatewood should be divided among the children of Mrs. Allen, or until the youngest child should attain its majority, and that defendants so held and possessed said land, then plaintiff is entitled to recover an undivided eighth of said land, and damages for the detention thereof."

"4th.—The jury are further instructed that as to the other 160 acres, on defendant's own evidence, plaintiff is entitled to recover an undivided eighth."

"6th.—If they find that defendant for ten years prior to the commencement of this suit was in the open, notorious

and adverse possession of a part of the 160 acres of land on which he had claimed a pre-emption, and that he was so claiming the whole of said 160 acres by agreement with Gatewood or Mrs. Allen for a deed to the same, they should find for the defendant, unless they find the patents for the land in question issued within ten years before the commencement of this suit."

"7th. The effect of the deed from Gatewood to Mrs. Allen and her children, was to make them tenants in common of the land conveyed, unless defendants then claimed the 160 acres of land, upon which they first settled, as their exclusive property, adversely to plaintiff and his mother and her other children, and were in the actual possession of a part thereof, claiming the whole under an agreement with Gatewood or Mrs. Allen, that they were to hold and occupy the same as their land exclusively. But such claim will not avail defendant if the patent for said land was issued ten years before the commencement of this suit. And if there was no such agreement with Gatewood, or Mrs. Allen, as that mentioned in the foregoing instruction; yet, if at the time of the conveyance to Mrs. Allen and her children, defendants were in the open, actual possession of a part of said 160 acres of land, claiming it adversely to all persons, then the deed from Gatewood to Mrs. Allen did not have the effect to make defendants tenants in common with Mrs. Allen and her children, as to that part of the said 160 acres so actually in the possession of defendants, unless the patents issued ten years before the commencement of this suit.

The defendants objected severally to the foregoing instructions and their objections being overruled, they at the time excepted.

The court then gave a number of instructions at the instance of the plaintiff which were objected to by the defendants, but as no new or additional principle of law is involved in them, not contained in the instructions copied, they will not be further noticed.

Some seven or eight instructions were asked for by the defendant and refused by the court, yet all but the sixth were

based on the idea that the will of Mrs. Menx had the effect to vest the whole subject of the bequest in Mrs. Jane Claybrook, and were merely the converse of the instructions given by the court. They, therefore, need not be copied here.

The sixth instruction asked by the defendants and refused by the court was as follows :

"The jury are instructed that the presumption is that the patent issued within a year or two after the land was entered, and the burden of proof is on the plaintiff to show that it was not so issued."

The jury found a verdict for the plaintiff for one undivided eighth part of the land described in the petition, and judgment was rendered accordingly.

The defendants filed a motion for a new trial and in arrest of the judgment.

On the argument of the motion for a new trial, the plaintiff asked leave to remit part of the verdict, that is to say, to reduce the quantity of interest recovered in the land from one-eighth part thereof, to 11-90 thereof. The court permitted the plaintiff to remit as asked for, and rendered a judgment for 11-90 of the land named in the petition. To this action of the court the defendants excepted.

The defendants' motion for a new trial and their motion in arrest of judgment were then overruled by the court, and the defendants again excepted and appealed to this court.

The material question discussed by the parties to this suit, in this court, going to the merits of the controversy, grows out of the construction to be placed on the clause of the will of Jane Menx hereinbefore set forth, and the deed made by Gatewood to Jane Claybrook and her children. The clause of the will referred to, in speaking of the residue of the estate of the testatrix, directs the executors of the will to "secure the one-half thereof by trust or otherwise, for the benefit of my niece, Mrs. Jane Allen, daughter of my sister Gatewood (who is said to be in destitute circumstances) and her children, and not to be subject to the control of her present husband."

Allen v. Claybrook, et al.

It is contended by the defendants that this was a bequest for the benefit of Jane Allen, who took the entire estate or property and could dispose of the same absolutely, for the use of herself and children, as she pleased; that the children of Jane Allen took no present interest in the fund or property bequeathed; that the word "children," as used in the will, was only used for the purpose of showing that it was intended that Jane Allen should hold the property, as separate property for her and her children, free from the control of her husband.

It is true, that as a general rule where personal property is bequeathed to one who is invested with a power of disposition of the fund or property in a way that might result in a consumption of the property itself, it is construed to be an absolute gift. In the present case, however, the bequest is not placed under the control of Jane Allen. The fund is to be secured by trust, or otherwise, for the benefit of Jane Allen and her children, and it is to be held free from the control of Jane's present husband. Jane has no power of disposition of the property by any express terms, nor do we think any such power is to be implied. The language is just the same as it respects Jane and her children. We are referred to the case of *English vs. Bechle*, (32 Mo., 186,) as an authority in point in this case. That action, like this, was brought to recover an undivided interest in a lot of land. The plaintiffs claimed as representatives of one of the children of *Marianne Belford*. The lot had previously been conveyed to said *Marianne* who had afterwards conveyed the same and then died; and it was claimed by the plaintiffs that *Marianne* only had a life estate and could convey no more, and that by virtue of the conveyance of the lot to her, upon her death, the lot would vest in the plaintiffs or their grantors. The deed relied on in that case used this language "I sell, cede, relinquish, and transfer to the said *Marianne Belford*, by birth *Guitarre*, all the rights, titles, actions, claims and property which I have and can have in and to a lot (describing it) for the said *Marianne* and (*ainsique*) her heirs in di-

rect line, to have, manage and dispose of at her will and pleasure and as of property belonging to her, and so that the said lot above sold may not be pledged, obligated, aliened, incumbered and mortgaged to satisfy the engagements which Belford, the husband of the said Marianne, might enter into; it being necessary that the said lot should always remain as the property of the children, the heirs of the said Marianne." It was held by the court that the wife took an estate in fee simple, and had full power to convey the lot absolutely; that the deed having vested the title in the wife with full power to convey or dispose of the same as she pleased, gave her an absolute title, and that the expression at the end of the deed, "it being necessary that the said lot should always remain as the property of the children, the heirs of said Marianne," is only an explanation of the reason for the creation of a separate estate in the wife. The present case is not like the one referred to. In that case the lot was conveyed to Marianne and her heirs forever, with full power in her to dispose of the same at her pleasure, as her own property. But in the present case the property is secured in trust or otherwise for the use and benefit of Jane Allen and her children, and no power is attempted to be vested in Jane to dispose of the whole property any more than such power would be vested in the children. It seems to me that this case cannot be distinguished from the case of *Hamilton vs. Pitcher*, (53 Mo., 334). I, therefore, think that the children of Jane Allen took a vested interest in the bequest of Mrs. Menx at the time of her death. The children having been designated as a class, without further description, the general rule is that it will include all who answer to the description at the time the will took effect. (Jarm. Wills, 2nd. Vol. 54; Wigram Wills and O'Hara Const., 290.)

The two first instructions given to the jury by the court seem to fairly present the law growing out of the evidence in support of the plea of the statute of limitations as to one tract of the land in controversy. The third and fourth instructions improperly tell the jury that the plaintiff, if he recovers,

Allen v. Claybrook, et al.

is entitled to recover one-eighth part of the land, when from the evidence it is admitted that the plaintiff was only entitled to 6-55 of the land. And again, it is difficult to see how the court arrived at the conclusion that plaintiff was not entitled to more than 11-90 of the land for which the judgment was rendered, after the motion was filed for a new trial, when the deed from Mrs. Allen to defendants had been excluded from the evidence. The court clearly erred in excluding the deed of Mrs. Allen to defendants. The deed was clearly admissible to show a conveyance of the land in dispute, of at least her undivided interest in the land in controversy.

The 7th instruction given to the jury by the court is clearly improper, and calculated to confuse or mislead the jury in reference to the issues made on the plea of the statute of limitations. By that instruction the jury are told, that the deed from Gatewood to Mrs. Allen and her children had the effect to make them tenants in common of the land conveyed, unless the defendants then claimed the 160 acres of land upon which they first settled as their exclusive property adversely, etc.; but such claim will not avail defendants if the patent for said land was issued ten years before the commencement of this suit. That part of the instruction is certainly improper and is certainly inconsistent with the latter part of the instruction which, in effect, tells the jury that the ten years time to constitute a bar did not begin to run until after the patent for the land had been issued. It may be that this instruction has been improperly copied by the clerks. We cannot, however, assume that it is wrongly copied.

For the reasons that the deed from Mrs. Allen to defendants was improperly excluded from the evidence, and the instructions were improper and defective in reference to the matters herein stated, and that the judgment is admitted to be for an improper amount of interest in the land, the judgment will be reversed and the cause remanded; the other judges concur.

WILLIAM DUNN, Respondent, vs. JAMES RALEY, Appellant.

1. *Mortgage—Seal, irregularity in—Deed may be enforced notwithstanding, in equity.*—A mortgage may be irregular where the seal is omitted or not in accordance with law, but it will nevertheless be valid to create a lien, a trust for the benefit of creditors, which can be enforced in equity; and even where suit is brought at law to foreclose the mortgage it will not be reversed simply for such defect.
2. *Judgments, may be amended nunc pro tunc, how.*—The established rule in this State is that in all cases where it is attempted to amend a judgment *nunc pro tunc* the record must show the facts which authorize the entry.
3. *Mortgage, suit on—Prior encumbrancer made party defendant—How far concluded thereby from suit on first mortgage—Res adjudicata—R. C. 1855—Construed statutes.*—In suit brought to foreclose a mortgage while the statute of 1855 in relation to mortgages was in operation (See § 7) plaintiff had a prior encumbrancer made one of the parties defendant. But the petition did not ask that plaintiff might have the privilege of paying off his claim and be subrogated to his rights, nor that said claim should be first satisfied in order that a clear title might be obtained upon a sale. Upon these matters the judgment was also silent. *Held* that such suit did not constitute a bar to further proceedings by the first encumbrancer on his mortgage. Although technically made a party his rights were unaffected.

Appeal from Schuyler Circuit Court.

E. W. Higbee, W. W. Cover and James Raley, for Appellant.

Goldrick, Hughes & Caywood for Respondent.

WAGNER, Judge, delivered the opinion of the court.

From the record it appears, that in 1858, one Geo. F. Cupp was the owner of the land in question and executed a mortgage on the same to the plaintiff, to secure the payment of a promissory note, therein mentioned. Subsequently Cupp sold the land to Henry G. Payton, and took a mortgage thereon to secure the purchase money. When this last or second mortgage became due, Cupp brought suit to foreclose it, making plaintiff, Payton, and the tenants in possession defendants.

Payton and plaintiff were both notified by publication, and at the return term a judgment by default was taken against them, which at the next term was made final. During the pendency of the suit the claim was first assigned to the defendant herein, and then by him again assigned to Mary A. Cupp, in whose name the final judgment was taken.

Dunn v. Raley.

The land was sold by virtue of an execution, issued under the judgment of foreclosure, and the defendant became the purchaser. Plaintiff afterwards brought this suit upon his first mortgage to foreclose, and it was resisted by the defendant, on the ground that the prior suit was a bar to the action, and that the rights of the plaintiff were concluded thereby. But this defense was unavailing, as the court found for the plaintiff, and the defendant has therefore appealed the cause to this court.

An objection is made to the mortgage of the plaintiff, and it is alleged that it is not sealed in the manner required by law. Opposite the grantor's name, the word seal is written, but it is not surrounded by any scrawl or other written device.

It is very true this does not comply with the statutory requirements in reference to seals, but the mortgage is not in consequence thereof avoided. A mortgage may be irregular where the seal is omitted, or not in accordance with law, but it will nevertheless be valid to create a lien, a trust for the benefit of the creditor, which can be enforced in equity. (*McClurg vs. Phillips*, 49 Mo., 315; *McQuie v. Peay*, *ante* p. 56.) And although this suit for foreclosure is not a proceeding in equity, yet if we find no other error in the record, we would not be justified in reversing the judgment, on that account, and compelling the plaintiff to proceed anew, when the same result must follow.

In the suit of *Cupp vs. Payton*, a special judgment was rendered awarding execution against the mortgaged premises to satisfy the debt; and at the conclusion of the judgment, it was declared that the equity of redemption of all the defendants was foreclosed. During the progress of this case, a motion was made to amend the judgment by an entry *nunc pro tunc*, so as to show, that not only the equity of redemption, but the entire interest of the defendants was foreclosed and adjudicated. This motion was overruled.

The minutes kept by the judge presiding at the trial, and by the clerk also, simply showed that a judgment was given

for the plaintiff, but there was nothing whatever to indicate that any different judgment was intended from that which was written on the records of the court.

The established rule in this State is, that in all cases, where it is attempted to make a *nunc pro tunc* amendment, the record must show the facts which authorize the entry. Here there was nothing to amend by and the ruling of the court was therefore correct.

But it is contended that the effect of bringing plaintiff as first mortgagee into court and making him a party was a conclusive bar as to all his rights. This we think is founded in an entire misapprehension. The petition in the case merely alleged that plaintiff held a prior incumbrance and asked that he might be made a party. It did not ask that the plaintiff in the case might have the privilege of paying off his claim, and be subrogated to his rights, nor did it propose that his lien should be foreclosed and that his claim should be first satisfied, in order that a clear title might be obtained upon a sale. Upon these matters the judgment is also silent.

The proceeding was governed by the statute of 1855, and the seventh section of the act in relation to mortgages provides, that all incumbrancers or persons having an interest existing at the commencement of the suit, subsequent, as well as prior, in date to plaintiff's mortgage, provided the same shall be of record in the county where the same may be situated at the commencement of the suit, shall be made parties, otherwise they shall not be bound by the judgment. (2 R. C. 1855, p. 1089, § 7.)

The statute merely enunciated a rule that had long existed in courts of equity. Its obvious purpose and object was to bring in all parties in interest, that their rights might be determined and adjudicated in one action and thus avoid a multiplicity of suits.

Unless provision is made for satisfying the claim of the first mortgagee, nothing more than the equity of redemption can be decreed to be sold. In *Kilborn vs. Robbins*, (8 Allen 466) it is held, that where a prior mortgage exists, the second

Dunn v. Raley.

mortgagee can acquire the premises only by redeeming the same, and paying such sum of money as may be justly due thereon.

In the case of *Hudnit vs. Nash*, (1 O. E. Green, N. J. 550) where the practice exists under the equitable rules of court, it is said: "Under our practice, doubtless, the prior mortgagees are made parties to avoid a multiplicity of suits, so that the premises may be sold free from incumbrances, and most advantageously for the interests of the owner of the equity of redemption. But still in strict technicality and in its practical operation, the bill as against the first mortgagee, is a bill for redemption, not for foreclosure. The mortgage is redeemed; not technically, by the payment of the debt in advance by the complainant, but the same result is reached by its being paid or redeemed, first in order out of the proceeds of the sale. By coming in with his mortgage, the first mortgagee assents to the relief prayed for by the complainant. Beyond that he asks no relief. As against him the relief sought for will not be granted, unless by his consent, or upon payment of the amount actually due upon his debt."

The same doctrine is announced in *Holcomb vs. Holcomb*, (2 Barb. 20) where it is declared that the plaintiff may make prior incumbrancers parties to the bill, for the purpose of having the amount of such incumbrances liquidated and paid out of the proceeds of the sale.

But in the case brought by Cupp to foreclose his mortgage against Payton, no such thing was done or attempted to be done.

The plaintiff in this case was simply made a party as holding a prior incumbrance, but no relief was asked for against him in the petition, or given by the judgment of the court. Under such circumstances, although he was technically a party to the record, it is manifest that his rights remained unaffected.

The judgment should be affirmed; the other judges concur.

Burdal v. Davies.

JAMES S. BURDSAL, Defendant in Error, *vs.* EVAN L. DAVIES,
Plaintiff in Error.

1. *Practice, civil—Pleading—Suit on note—Failure to aver filing of note, or excuse for not filing—Motion in arrest will not lie, when.*—In a suit on a promissory note where defendant pleads to the merits, motion in arrest will not lie on the ground that the note was not filed with the petition, and that the petition neither alleged the filing or any statutory excuse for failure to file. For if the petition is in other regards sufficient, these averments are not necessary in order to constitute a cause of action. Such pleading is doubtless defective and demurrable. But it states a cause of action however defective; and the defect is cured by verdict.

Error to Jefferson Circuit Court.

Ahlrsers, for Plaintiff in Error, cited in argument: *Rothwell vs. Morgan*, 37 Mo., 107.

J. J. Williams, for Defendant in Error.

I. The objection that the original note was not filed with the petition instead of the copy, was waived by failure on the part of defendant to demur. (Wagn. Stat., 1014-15, §§ 6, 10; *Id.*, § 19, p. 1036; *Richardson vs. Farmer*, 31 Mo., 35.)

II. A petition, however defective, will be cured by verdict after issue is joined and a trial had on the merits, unless it wholly fails to state a cause of action. (*Welch vs. Bryan*, 28 Mo., 30; *Frazier vs. Roberts*, 32 Mo., 457; *Richardson vs. Farmer*, 31 Mo., 35.)

The filing of a note sued on is not material, although the statute requires it to be done, except in certain cases. (*Dyer's adm'r vs. Murdock*, 38 Mo., 224.)

SHERWOOD, Judge, delivered the opinion of the court.

The point in this case to which our attention has been specially called is this:

Whether in a suit on a promissory note, a defendant having pleaded to the merits, can, after verdict against him and judgment accordingly, successfully move in arrest, because the note sued on is not filed with the petition, nor does the petition allege the filing, or any statutory excuse for failure in this particular. And the discussion of this point necessarily involves the discussion of another, namely: Whether the

petition lacking these allegations states a cause of action. For, unless the petition does this, even the healing powers of a verdict under the liberal provisions and intendments of our statute of jeofails, could not remedy the evil, as this lack in a petition is held fatal, and advantage may be taken of it at any stage of the proceedings, and to the same extent as though the court had no jurisdiction over the subject matter of the action. (2 Wagn. Stat., § 10, 1015.)

Although the forms of pleading usually adopted in this State, allege the fact of filing the instrument sued on, yet this is a mere gratuitous averment, altogether *dehors* the statute, as will be seen by 2 Wagn. Stat., 1022, § 51; which, while requiring the instrument to be filed, requires no mention of this to be made; and it is only when the requirements of that section as to filing have not been complied with, that a reason therefor must be given.

It will be universally conceded, that a pleading can only be held faulty on account of matter apparent upon its face; and since this is so, it must be evident, that a petition, otherwise sufficient, is not objectionable on the score that it does not state facts sufficient to constitute a cause of action, even though it be silent as to the plaintiff's compliance with some extraneous statutory requirement. In a suit on a promissory note, the statement of a cause of action is complete when, with appropriate averments, the execution of the note by the defendant, and its non-payment at maturity are set forth. If this be true, then it can but follow, that the failure to state any additional matter although required by the statute, or the statement of such matter in a defective manner, does not take away nor lessen the legal force and effect of the previously made allegations—facts sufficient to constitute a cause of action still remain. The case of *Rothwell vs. Morgan*, (37 Mo., 107,) cited and confidently relied on by defendant's counsel, does not militate against the foregoing views in the slightest degree. The plaintiff in that case did not file the note sued on, nor did the petition allege its loss or destruction, and it was merely held there, that after answering, the defendant

might have the suit dismissed on motion. It is true that in the conclusion of that opinion this language is used :

"The omission to file the instrument with the petitor, or to allege its loss or destruction, was such a defect as was not waived by a failure to raise the objection by demurrer or answer." The "defect" here alluded to, was not any deficiency in the petition either in form or substance; not any failure to state a cause of action, which could not be waived by answering over; but simply a defect in the proceedings instituted by the plaintiff for the recovery of his debt, in that he failed to meet the requirements of the statute by either, first, filing the note with his petition, or second, giving the statutory excuse for such omission.

In the present case, the petition was doubtless defective and demurrable on the ground that in attempting to excuse plaintiff's failure to file the note, a reason was offered which the law does not sanction. But the petition undoubtedly stated a cause of action, however defectively that may have been done, and it is altogether too late for the defendant, after he has answered to the merits, and especially after he has had a trial so fair in every respect, that he would save no exceptions during its progress, to now come forward and seek the reversal of a judgment on grounds, which if our Practice Act is to be obeyed, have not the poor merit of being good even as technicalities.

The above remarks are sufficiently comprehensive to embrace a point urged by defendant's counsel, but not yet specifically noticed, that the petition showed that a former suit had been instituted on the same cause of action, and no allegation was made but that it was still pending and undetermined.

Judgment affirmed ; all the judges concur.

ANDREW GIBONEY, Plaintiff in Error, vs. CITY OF CAPE GIRARDEAU, Defendant in Error.

1. *Constitution—Extension of city limits—Legislative power—Taxation.*—An act of the legislature enlarging the limits of a municipality, and thereby bringing within its area and subjecting to municipal taxes against the owner's consent, farm property lying outside of the actual city limits, is not, by reason of such facts, unconstitutional. Such act is a proper exercise of legislative power and discretion.

Error to Cape Girardeau Circuit Court.

Louis Houck, for Appellant.

I. The power of the legislature to extend the city limits of a city is not denied, and indeed the doctrine is well settled in this State. (See *St. Louis vs. Russell*, 9 Mo., 507; *St. Louis vs. Allen*, 13 Mo., 400.) But while this power of the legislature is conceded, the plaintiff in error denies that the legislature can require farm lands, not valuable for city property, to contribute to the municipal treasury.

In Kentucky the principle has been adopted, that the "courts will, in such cases, control and limit the taxing power to that point or line where it ceases to operate beneficially to the proprietor in a municipal point of view." (*Cheaney vs. Hooser*, 9 B. Mon., 330; *Sharp vs. Dunover*, 17 B. Mon., 223; *Maltus vs. Shields*, 2 Met., [Ky.] 553; *Southgate vs. Covington*, 15 B. Mon., 491.) Suburban property in Kentucky cannot be embraced in municipal limits merely for revenue purposes. (*Arbequest vs. Louisville*, 2 Bush. [Ky.], 271; *Durant vs. Kauffman*, and *Mitchell vs. Davenport*, June term, 1872, of the Iowa Supreme Court, cited in *Dillon's Mun. Corp.* [1st. Ed.], 598; *Longworthy vs. Dubuque*, 16 Iowa, 407; *Bradshaw vs. Omaha*, 1 Neb., 16; *Benoist vs. City of St. Louis* 15 Mo., 671-2; *Walden vs. Dudley*, 49 Mo., 421; *Lee vs. Thomas*, 49 Mo., 112.)

C. G. B. Drummond, for Defendant in Error.

I. The extension of the limits of the city of Cape Girardeau, and the taxation of the annexed territory, for city purposes, are constitutional. (*Weeks vs. City Milwaukee*,

Giboney v. City of Cape Girardeau.

10 Wis., 262-3; Powers vs. Com'rs Wood Co., 8 Ohio St., 285, 290; Baker vs. State, 18 Ohio, 514; City Zanesville vs. Auditor Muskingum Co., 5 Ohio, 592; Blanchard vs. Bissell, 11 Ohio, 96; Knowlton vs. Supervisors Rock Co., 9 Wis., 410; Cooley 500, note 1, 504; St. Louis vs. Russell, 9 Mo., 511-12; St. Louis vs. Allen, 13 Mo., 409-415; Benoist vs. St. Louis, 15 Mo., 671-2; Walden vs. Dudley, 49 Mo., 422; 5 Branch, 1; Blackw. Tax Tit., 164, and authorities, note 2; People vs. Wren, 4 Scam., 273; 21 Ill. 457; 8 Blackf. [Ind.], 361; Theo. Lyman vs. Luke Fiske, 17 Pick., 222; 21 Penn., 607; 11 *Id.*, 62; 9 Hump., 252; 13 Ill., 516; 5 Gilm., 405; 15 Conn., 475; 8 Leigh, 120; 3 Gratt., 247; 2 Jones, 171; 24 Wend., 65; 4 Comst., 419; 14 Barb., 559; 24 Barb., 232; 38 N. Y., 38.)

II. The local benefit and necessity in such cases are matters wholly for legislative determination. (Hamilton vs. St. Louis Co. Ct., 15 Mo., 26; State *ex rel.*, St. Louis, Police Com'rs vs. St. Louis Co. Ct., 34 Mo., 570; Benoist vs. St. Louis, 15 Mo., 671; Egyptian Levee Co. vs. Hardin, 27 Mo., 496; 13 N. Y., 143; 19 N. Y., 116.)

NAPTON, Judge, delivered the opinion of the court.

This case involves substantially the same question decided by this court in Allen vs. City of St. Louis, (13 Mo., 400); Russell vs. City of St. Louis, (9 Mo., 507); Lee vs. Thomas, (49 Mo., 112); and Walden vs. Dudley, (49 Mo., 421); the two last cases having sanctioned the doctrine decided in the two first.

The complaint of Giboney is, that the legislature has legislated his farm into the city of Cape Girardeau, though it is actually a mile or more from the real town, and separated from it by the college tract, and he insists that as his farm cannot be divided into town lots and has received no increase of value by reason of being adjacent to Cape Girardeau, he ought not to be subjected to municipal taxation.

His complaint may be a just one; whether it is or not, this court would hardly be qualified to decide. The fun-

Giboney v. City of Cape Girardeau.

damental question in these cases is, whether the question is a judicial or legislative one, and our court has decided that it was a legislative one, and we think this decision was right.

It is the duty of the legislature, in creating municipal corporations, to see that no power is given to them in regard to taxation, which may be abused. As to the judiciary, they have no revision of legislative discretion on this subject, and they have no responsibility for mistakes in legislation. If Mr. Giboney's farm has been incorporated within the city of Cape Girardeau by the charter granted to that city, the legislature that granted the charter is responsible. It was a matter of legislative discretion. The courts have no power to prevent such laws.

When this power has been assumed by the judiciary, as in Iowa and Kentucky, the embarrassment has been obvious. Thus, in Iowa (*Fulton vs. Davenport*, 17 Iowa, 404), the court had no hesitation in deciding that whenever the owner of a tract of land, embraced within the bounds of a municipality, laid it out into town or city lots, it was liable to taxation as city property; and even when this had not been done by the owner, but was in such close proximity to the settled and improved parts of the town that the corporate authorities could not open and improve streets and alleys and extend to the inhabitants the usual police regulations without incidentally benefiting the proprietors of such property by these personal privileges and accommodations, or in the enhancement of that property, the power to levy taxes also arose, but *that it should be exercised with great circumspection*.

And the court, applying this rule to the facts reported to them by a referee, concluded that the property taxed occupied no such attitude towards the improved parts of the town as to subject it legally to municipal taxation.

In arriving at this conclusion the court necessarily assumed itself to be wiser than the legislature of the municipality which determined otherwise, and wiser than the legislature of the State which had conferred the power on the municipality to decide the question. And the opinion in this case was merely

in affirmation of previous ones, and was subsequently adhered to.

In our opinion it is not a judicial question. Undoubtedly, legislatures should be cautious in investing such power in a municipality, and should provide restrictions to prevent an abuse of the power. This is generally done, and if, in the case of the charter of Cape Girardeau, this restriction was omitted, the remedy is by a change of law.

The opinion of the Supreme Court of Kentucky, in *Cheany vs. Houser*, (9 B. Mon.) presents the same difficulties that are obvious in the Iowa decisions. The argument of the learned judge in that case to point out the circumstances where legislative discretion ceases and judicial interposition is allowed—where taxation becomes confiscation, or taking private property for public use without compensation,—is based on refinements and distinctions difficult to be comprehended, and still more difficult to be enforced; and we think, so far as the case decided was concerned, mere abstractions for the judgment of the court was in favor of the validity of the tax.

This subject was fully discussed in *St. Louis vs. Allen*, (*supra*) and decided according to the previous case of *Russell vs. St. Louis*, (9 Mo., 511) and the opinion subsequently adhered to, and the result of these decisions was, that the power of extending the limits of municipalities or of diminishing them, was a legislative power, and the power of taxation, if granted in the charter, was also intrusted to the municipal legislature, and the judiciary had no right to interfere unless the taxation was of a character prohibited by the Constitution. It is not claimed in this case that the taxation, conceding the right to tax, was in conflict with any constitutional provision, but simply that no right of taxation at all existed, on the ground that Giboney was not within the *actual* town or city, though confessedly within the limits as fixed by the charter. And this merely comes back to the question of the power of the extension which, as we have stated, is settled in this State.

Smith v. Clark.

And it may be added, as a reference to the numerous authorities cited in the learned brief of the defendant's counsel will show, that this doctrine as settled here has the sanction of, and is in conformity to, the views entertained by nearly all, if not all, the American courts, except those above referred to in Iowa and Kentucky.

Judgment affirmed; the other judges concur.

—o—

PHILLIP M. SMITH, Respondent, *vs.* LORENZO CLARK, Appellant.

1. *Instructions.*—*Compliance with contract question of fact for the jury.*—In building contracts the question whether the work was done as required by the contract, is one of fact for the jury. An instruction "that the plaintiff, by undertaking to do defendant a plain, substantial and workmanlike job, did not undertake to do a perfect one," is erroneous, for the reason that it took from the jury a question of fact which it was their province and not that of the court to determine. *Held*, further, that to do a thing in a plain, substantial and workmanlike manner, would imply that it should be perfectly done for the character of the job contemplated.

Appeal from Adair Circuit Court.

Greenwood & Picker, and Harrington & Cover, for Appellant.

Ellison & Ellison, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a suit on a mechanic's lien, brought by the plaintiff, who had built a house under a special contract for the defendant.

The answer set up as a defense that defendant was greatly damaged by reason of the unskillful, negligent and bad manner in which the house was built. The terms in the contract were, that the work was to be done in a plain, substantial and workmanlike manner.

The evidence was conflicting. Defendant introduced testimony tending to prove the allegations of his answer, and testimony of a counter character was introduced by the plaintiff.

The plaintiff had a verdict and no objections are taken to any ruling of the court, except in the matter of giving instructions.

We have examined all the instructions and they present the law with unexceptionable fairness, save the second, given at plaintiff's request, which is as follows: "The court instructs the jury that by plaintiff's undertaking to do defendant a plain, substantial and workmanlike job, he did not undertake to do a perfect one; and in determining the fact as to whether it was, when finished, a plain, substantial and workmanlike job, they can consider the material to be used, the kind of work to be done, as well as all other circumstances in the case."

This instruction is certainly wrong. What amounted to doing the work in a plain, substantial and workmanlike manner, was a question exclusively for the jury. But the instruction undertakes to withdraw that question from the jury, and as a matter of law, define what the terms mean, and as we think, it gives an entirely incorrect definition. To do a thing in a plain, substantial and workmanlike manner would imply that it should be perfectly done for the character of the job contemplated. Surely an imperfect execution of the work, as the instruction implies, would not be a performance of the contract.

Had the question been left where it properly belonged, exclusively to the determination of the jury, this error would have been avoided. As it is, the instruction was erroneous, as it was well calculated and had a direct tendency to mislead, and the judgment must be reversed and the cause remanded; the other judges concur.

Harbison, et al. v. Swan.

LOUISA HARBISON, *et al.*, Plaintiffs in Error, *vs.* CHARLES SWAN, Defendant in Error.

1. *Wills—Devises in fee tail—Cross remainders—Statute of 1825—Farrar vs. Christy.*—A will contained the following bequest: "I give and bequeath to my daughter Harriet the north half of my tract of land in "A.," and the south half thereof to my daughter Juliet, and in the event of the death of Harriet or Juliet without issue, the part devised to the one deceased to descend to the survivor; and in the event of the death of both without issue, the said parcels of land shall descend to the heirs of my daughter Mary and my daughter Clarissa, to be equally divided among them when they become of age." Juliet died after the death of testator, leaving a son who survived her but a short time, and his father became then the sole surviving representative of said son. Harriet subsequently died without issue. *Held*, that notwithstanding the manifest intent of the testator to keep the estate in the blood, under the statute touching descents and distributions, it passed to the surviving husband of Juliet.

By the will Juliet was immediately vested with a fee simple title to Harriet's estate, subject to be divested by the birth of children to Harriet, and the latter was in like manner and subject to the same conditions vested with a fee simple in the estate of Juliet. As Juliet had a son who survived her, Harriet's interest in the estate of Juliet ceased. But as Harriet died childless, the fee simple of Juliet in her estate was never divested. Hence, on Harriet's death it passed to the heirs of Juliet and not to the heirs of Harriet. (*Farrar vs. Christy*, 24 Mo., 453.)

Error to Cape Girardeau Circuit Court.

Louis Houck, for Plaintiffs in Error.

I. Under our statute of 1825, the remainder of Harriet's fee tail estate can vest in no other person than one who by the course of the common law would be an heir to her estate tail, had the estate not been destroyed. In other words, the statute does not reach a case where the first grantee has no issue. The statute means that the heir of the first taker shall have the absolute fee simple. Now since Harriet had no issue, and according to the course of the common law the estate devised to her would pass to her issue, and in default thereof to the blood of VanHorn, we maintain that the defendant, Swan, cannot claim her estate by virtue of the Van Horn devise.

II. It will be claimed that under the will Juliet and Harriet each had only a life estate, and that the fee to Juliet's share vested in Harriet, and the fee to Harriet's share in Juliet, subject to be divested by the birth of issue; in other words, that VanHorn's devise raised cross-remainders, and in support of this view of the case, respondent will cite *Farrar vs. Christy*, (24 Mo., 467). But if the position assumed be correct, that the whole fee was granted to the several devisees, no cross-remainder can arise. While at the time of the execution of the deed in *Farrar vs. Christy*, neither Edmund nor Howard Christy had heirs, at the time of Van Horn's death Juliet had issue. Certainly it cannot be said that the remainder of Juliet's share vested in Harriet, because it vested in Nathan Swan—Juliet's son. It is evident that the case at bar is not one of cross-remainders. Hence, the *Farrar vs. Christy* case is not in point.

Nalle & Sanford, for Defendant in Error.

I. The estates tail created by the will were destroyed by the act of Feb. 14, 1825, and the life estate vested in each, to the portion of the realty bequeathed them, while the remainder in fee simple absolute to Juliet's portion vested in Harriet, and the remainder in fee simple absolute to Harriet's portion vested in Juliet, subject to be divested in each instance by the birth of issue. (Statutes Mo., 1825, 45, 55, 65, &c.; 1 Hill. Real Prop., p. 504, § 17; 4 Cruse's Dig., p. 379; 2 Wash. Real Est., p. 233; *Farrar vs. Christy*, 24 Mo., 467.)

II. The birth of issue to Juliet divested Harriet of the fee to the portion bequeathed to Juliet. (*Farrar vs. Christy*, *supra*.)

III. At the death of Juliet, Harriet dying without issue, also, the whole estate vested in the only child of Juliet, and at the death of this child descended to his father, this defendant Swan.

Harbison, et al. v. Swan.

NAPRON, Judge, delivered the opinion of the court.

The controversy in this case grew out of certain provisions in the will of Nathan VanHorn, the plaintiffs and defendant being his descendants, and both claiming under the same provisions. These provisions of the will and the facts agreed on, present the only question in the case.

The agreed facts are, that Nathan VanHorn made his will on April 13, 1846; that he died sometime in January, 1852; that his will was duly probated, etc. Juliet and Harriet Van Horn, his daughters, (he had other daughters and sons) were, at the date of making the will, unmarried. Juliet was afterwards, and before the death of her father, married to the defendant, Chas. Swan. When her father's will took effect, that is, on his death, there was living as her issue from her marriage with defendant, their son, Nathan Swan. Juliet died on or about March 19, 1852. Sometime in September of this year (1852) the son, Nathan, died, without issue and intestate, and the defendant, his father, is the sole surviving representative of said Nathan Swan.

Harriet VanHorn, after the making of the will, was married, but had no issue, and died about the year 1868, intestate, and her husband is dead.

The real estate in controversy consists of the two tracts of land devised to Juliet and Harriet, by the aforesaid will of their father, Nathan VanHorn. The defendant is in possession of the whole tract, and obtained possession of Harriet's part after her death.

The plaintiffs are the descendants of Mary VanHorn (subsequently Harbison) and of Clarissa VanHorn, who married Dickerson. They, Mary and Clarissa, were sisters of Harriet and Juliet. There is no question of the title of Nathan Van Horn at the time of his death, and the rights of the parties depend on the construction of two clauses in his will, which are as follows:

Fifth. "I give and bequeath to my daughter Harriet the north half or division of my tract of land as will appear by

a plat of the survey made by Aaron Snider on the 25th and 26th March 1840, which north division contains 320.53 acres as will appear by reference to the plat of survey. Also an account of advances made her, as will appear by reference to said account."

Sixth. "I give and devise to my daughter Juliet VanHorn the south part of the aforementioned survey made by Aaron Snider on the 25th and 26th days of March, 1840, which south part includes my plantation, except the one hundred acres off the south end of this part of the survey, devised to my daughter Delia. The residue of this part of the survey contains 325.41 acres. I also devise to Juliet an account of advances made her, as will appear by reference to the account; and in the event of the death of my daughter Harriet or my daughter Juliet without issue, the part devised to the one deceased to descend to the survivor, and in the event of the death of both without issue, then it is my will that the aforesaid parcels of land shall descend to the heirs of my daughter Mary and the heirs of my daughter Clarissa, to be equally divided among them when they become of age."

In order to show the views of the plaintiffs and defendant, in regard to the construction of this will, we copy the instructions asked on either side.

For plaintiffs the court was asked to say: 1st. "That the heirs of Mary and Clarissa were seized in fee in remainder, respectively, of the portions of land devised to Juliet and Harriet. 2d. That upon the death of Nathan Swan, son of Juliet, Harriet, as the survivor, was entitled to said Juliet's share, as bequeathed to said Juliet by said Nathan VanHorn, and that the said Harriet having died without issue, the said Louisa Harbison, Wm. P., Virginia, etc. (descendants of Mary and Clarissa) are entitled to the possession. 3d. Said Juliet and Harriet, under said will, were respectively seized of a life estate, and the remainder was by said will vested in the heirs of Mary and Clarissa, subject to be divested by the birth of issue, and since no issue was born to said Harriet, the real estate devised to said Harriet, the fee of which was

Harbison, et al. v. Swan.

vested in the heirs of said Mary and Clarissa, was never divested, and the said Harbison, etc., heirs of Mary and Clarissa are entitled to the possession, etc. 4th. The limitation over to the heirs of Mary and Clarissa is good as an executory devise, and no issue of either Harriet or Juliet being living at the time of Harriet's death, the heirs of said Mary and Clarissa are entitled."

These instructions were all refused, and the defendant's given, which were as follows:

"Juliet VanHorn and Harriet VanHorn were vested with a life estate in a moiety of the land; that Juliet was then vested with the remainder in fee to the part devised to Harriet, and that Harriet was vested with the remainder in fee to the part devised to Juliet, subject to be divested by issue born to Juliet; that no issue having been born to Harriet, the remainder in fee, with which Juliet was vested by said devise, to Harriet's part or moiety was never divested out of Juliet; that upon Juliet's death the same descended to her son Nathan, and upon his death it was cast upon the father, the defendant; that upon the death of Harriet the defendant became seized of the moiety or part so devised to Harriet in fee simple absolute; that the remainder in fee, with which Harriet was vested by the devise, to the part devised to Juliet, was by the birth of issue to Juliet divested out of Harriet, and Juliet's son Nathan became invested with the said remainder in fee of his mother's part, and upon Nathan's death his father became seized of this part or moiety so devised to Juliet in fee simple absolute."

The court of course, after giving this instruction, gave judgment for defendant, and the propriety of this judgment is the only question here.

It may be observed and has been objected, that under the construction given to this will by the Circuit Court, the intent of the testator is totally frustrated. For Juliet died in 1852, leaving one son who lived a few months after his mother's death, and consequently, so far as Juliet's estate is concerned, became the owner in fee of her interest, and upon

his death the title passed to his father. And Harriet dying sixteen years afterwards without issue, her estate, according to the instruction, passed to Juliet's heir (who was her husband) not to her issue, the son, who was dead long before the death of Harriet, and thus the whole estate, so far from being kept in the blood of the testator, passes to an entire stranger.

But though this result may have been far from the intention of the testator, it does not follow that the courts are at liberty to disregard the fixed rules of law or the provisions of our statute of descents and distributions. This statute makes the father heir to the son, and totally abolishes the English law of keeping an estate in the blood of the first purchaser.

This will manifestly created an estate tail at common law in his daughters Harriet and Juliet, with remainder to the survivor, in the event of the failure of issue of the one dead, and in the event of the death of both without issue, remainder to the heirs of two other daughters named, who are plaintiffs in this case. Upon the death of Juliet, leaving a son, her estate manifestly passed to him, but her sister was then living, and survived this son nearly sixteen years, and upon the death of this sister Harriet, it is decided that her estate goes to the heir of the son, who was the husband of Juliet.

We have then in this case, which was an attempt to create a fee tail, a life estate in Harriet and Juliet in the specific land devised to each, with cross-remainders to the one surviving, and a devise over, in the event of both dying without issue, to the plaintiffs, who are heirs of two other sisters. Juliet had a son who survived her. Upon her death, the son clearly took her estate; and it is equally clear that after this event the devise to the daughters Mary and Clarissa, whose representatives are plaintiffs, failed, and they have no claim under the will. For the contingency upon which their title rested never rose. Juliet did not die without issue, and the remainder to them was placed on this contingency. That the issue of Juliet died long before the death of Harriet, the surviving sister, and that the heir of this issue was a stranger to the blood of the deviser, is merely the result of our statute law.

So far everything is plain enough, but when we come to Harriet's estate, the difficulty arises ; and there is no difficulty in regard to this, if we adhere to the decision of this court in *Farrar vs. Christy* (24 Mo., 453). Juliet was, according to this decision, immediately vested with a fee simple title to Harriet's estate, subject to be divested by the birth of children to Harriet, and Harriet was immediately vested with the fee simple in Juliet's estate, subject to be divested by the birth of children to Juliet. As Juliet had a son who survived her, Harriet's interest in the estate of Juliet ceased ; but as Harriet died without children, the fee simple of Juliet in Harriet's estate was never divested. Therefore it passed on Harriet's death to the heirs of Juliet and not to the heirs of Harriet.

The decision of this court, in *Farrar vs. Christy*, was based on a construction of our statute of 1825, abolishing entails, which has been severely criticized by the counsel in this case, and which undoubtedly tends to results not altogether such as the testator contemplated. The statute of 1825, declares that on the termination of the life estate to which it converted the entail, the remainder should pass in fee simple absolute "to the person or persons to whom the estate tail would, on the death of the first grantee, devisee or donee in tail, first pass according to the course of the common law, by virtue of such devise, gift, grant or conveyance."

This court held in the case of *Farrar vs. Christy*, that the estate did not pass to the heir of the first taker, according to the course of the common law, but to the party indicated by the deed or devise as the second taker. And as they held that the fee simple was vested on the execution of the deed in that case in *Howard and Edmund Christy*, subject only to be divested by the birth of issue, although *Howard* survived his brother *Edmund* many years, they held *Edmund's* estate to pass to his heirs, because *Howard* died without issue, as did also *Edmund*.

In that case, this construction seemed to defeat the intention of the deed, and there was a dissenting judge. But the

court observed, "It is unquestionably a maxim of our law, that all deeds shall be construed favorably, and as near the apparent intention of the parties as possible, consistently with the rules of law. If, however, the intention of the parties is contrary to the rules of law, it will then be otherwise; for it would be highly inconvenient and improper to permit private persons to contradict the general rules of law. The parties have created an estate tail against the policy of the law; the statute has declared that such estates shall not exist, and has prescribed the disposition of them. Now in dealing with the subject, it is obviously the duty of the courts to regard the intent of the legislature, and not that of the parties. The construction of the act is not designed for the circumstances of this particular case only, but for all others that may arise."

And the present case is likewise one in which the intent of the testator is most clearly subverted by an adherence to the construction of the statute of 1825, established in *Farrar vs. Christy*, or rather, it results from the doctrine established in that case, that, though Howard and Edmund had each a life estate in the lots given or conveyed to each, each had respectively a fee simple absolute in remainder to the lots conveyed to the other, subject to be defeated by the birth of issue, and this was maintained on the ground that to decide otherwise would leave the fee simple in abeyance.

This construction of the deed in *Farrar vs. Christy* was deliberately made after full argument, though Judge Leonard dissented, but as no opinion of his was filed, we may conclude that he merely entertained doubts, and the opinion of Judge Scott may be regarded as settling the question here. In truth, there is no hardship in this opinion but what arises from our statute of descents, under which a stranger to the blood of the first purchaser may occasionally come into the estate.

Here the testator evidently means to devise to his daughters Harriet and Juliet two defined tracts of land, with cross-remainders, so that the one should take the part devised to

Randolph v. Sloan.

the other, in the event that either died without issue, and in the event that neither had issue, he devised over to two other daughters or their descendants. But one of the daughters preferred had issue, and consequently the devise over failed. This issue of course took the title of his mother, and as the fee vested, according to *Farrar vs. Christy*, immediately in the mother to her sister's estate, subject only to be divested by issue of the sister, the heirs of the mother hold that title. And as the defendant is that heir, upon the death of his son, his title is complete.

We therefore affirm the judgment of the Circuit Court; the other judges concur.



WILLIAM RANDOLPH, Plaintiff in Error, vs. SAMUEL C. SLOAN,
Defendant in Error.

1. *Practice, civil—Petition for review—Unauthorized appearance of counsel.—*

Where there has been no personal service upon defendant and no appearance on his behalf of counsel thereto authorized by him, he has three years from date of the judgment, within which to petition for review.

2. *Judgments, setting aside of—Power of court.—*Courts may, in their discretion, set aside a final judgment at any time during the term at which it is rendered, on motion and *ex parte* affidavits.

Error to Marion Circuit Court.

Lander & Drummond, for Plaintiff in Error.

I. It is too late to move to set aside a judgment after final decree. (*Wagn. Stat.*, 1052, §§ 4, 5; *Matthews vs. Cook*, 35 Mo., 286.)

The rule that courts may modify or set aside its entries during the term at which they are made, does not include the power to set aside judgments lawfully rendered, especially after the term has passed. (*Ashly vs. Glasgow*, 7 Mo., 423; *Bartling vs. Jamison*, 44 Mo., 141.)

Anderson & Boulware, for Defendant in Error.

I. The judgment is in the breast of the court, and becomes a finality only by the adjournment of the court. The action of the court in granting a motion made during the term of its rendition, to set aside a judgment, is discretionary, and not subject to be reviewed in an appellate court. (Freem. Judg., pp. 62, § 90, and cases cited in notes; Dougherty vs. President, etc., 53 Mo., 579, Harber vs. Pacific R. R. Co., 32 Mo., 425; Hill vs. St. Louis, 20 Mo., 587; Ashly vs. Glasgow, 7 Mo., 320.)

II. In this case there was neither personal service nor appearance of the defendant, and the judgment would not become absolute until the expiration of three years from its rendition.

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiff, Wm. Randolph, alleged in his petition, in substance, that Robert H. Sloan, the brother of the defendant, conveyed to the latter certain real estate, and that such conveyance was made with intent to hinder, delay and defraud creditors, etc.; that upon a judgment rendered in behalf of one Dunn against Robert H. Sloan, execution issued and a sale of the land thus conveyed took place; at which sale plaintiff became the purchaser, receiving a deed from the sheriff therefor, etc. The usual relief is then prayed for. The non-residence of the defendant having been alleged, publication was made, returnable to the next July term. At that term judgment by default was entered; which was followed at the next February term, by final decree as prayed for. Six days after this disposition of the case, the defendant by his attorneys filed his motion verified by affidavit, to set aside the interlocutory and final decrees, alleging that he had a good defense to plaintiff's action, etc. etc.; that defendant is, and was, at the time of suit brought, a non-resident, had no personal service, nor had he any actual notice of the suit until after the expiration of the previous term; that the names of Anderson & Boulware were entered as appearing at that term for defendant at the instance of Robert H. Sloan,

Randolph v. Sloan.

who thought he had some interest in the suit; that since the close of that term, defendant has employed said attorneys, and that they were still acting in that capacity; that on the first day of the then current term, the attorney of plaintiff was notified that a motion would be made to set aside the decree *nisi*; and as said attorneys of defendant were so closely engaged in the trial of a certain criminal cause, they employed another attorney to file said motion and believed he had done so, until upon hearing the record read on the day previous, they were convinced to the contrary. A counter affidavit was thereupon filed by plaintiff's attorney, reiterating the charges of the petition and making additional ones. The court sustained the motion of defendant, granted him leave to answer, and in doing so, entirely disregarded the counter affidavit, on the ground that the matter alleged therein involved the merits of the case, and could not be tried on the motion. The plaintiff, upon the occurrence of this ruling, abandoned the cause. The defendant afterwards, availing himself of the leave granted, filed his answer; and the plaintiff, at the next term thereafter, refusing to proceed with his cause when the same was called for trial, it was dismissed and the various rulings mentioned are assigned for error.

No error, however, has been perceived in those rulings. No authorized appearance of the defendant had ever been entered to the action, and consequently, he, under the circumstances mentioned in his affidavit, had three years after rendition of final judgment in which to file his petition for review. This being the case, and all the proceedings being in the breast of the court during the term in which final judgment was rendered, it was fully within its discretionary powers to pursue the course of action which it adopted. (Sloan vs. Forse, 11 Mo., 85.)

Judgment affirmed; all the judges concur.

Ely v. Porter, et al., Ex'rs.

DAVID A. ELY, Respondent, vs. JOHN L. PORTER, et al., Ex'rs
of W. T. PORTER, dec'd, Appellants.

1. *Practice, civil—Objections waived by answering over.*—By answering over, defendant waives any objections to the action of the court in striking out his previous answer. And this is true even when exceptions are saved at the time.
2. *Note—Suit on—Descriptio personæ.*—A note was made payable to A. B. "president," and was secured by a mortgage wherein he was described as "president of the bank at Kirksville:" *Held*, that suit on the note was properly brought in the name of A. B. individually.
3. *Practice, civil—Pleading—Variance, when immaterial—Affidavit as to.*—In suit on a note, the petition alleged a promise to pay to "David A. Ely," while the note was made payable to "D. A. Ely." No affidavit was filed, (Wagn. Stat., 1033, § 1,) showing wherein defendant was misled. *Held*, that the variance was immaterial, and that having failed to make affidavit, he could not afterward complain.

Appeal from Adair Circuit Court.

Ellison & Ellison, for Appellants.

H. F. Millan, for Respondent.

VORLES, Judge, delivered the opinion of the court.

This action was brought in the Adair Circuit Court to recover the amount charged to be due on five promissory notes alleged to have been executed by the defendant, William T. Porter on the 10th day of July, 1866, for the payment to the plaintiff of five hundred dollars each, and also to foreclose the equity of redemption in certain real estate which, it was charged, had been mortgaged to plaintiff by a deed of mortgage executed at the same time with the execution of the notes by the defendant, William T. Porter, and in which his wife, Albina Porter had joined and relinquished her dower to the premises therein named.

After the commencement of the suit and during its progress, the defendant, William T. Porter died, and John B. Porter, and John L. Porter his executors, were made parties to the action.

During the progress of the trial, the defendants filed an answer and two amended answers, each of which was de-

Ely v. Porter, et al., Ex'rs.

cided bad or insufficient by the court upon demurrer, or was stricken out on motion made by the plaintiff. After these several answers were rejected or stricken out, the defendants obtained leave of the court to file a third amended answer which was accordingly filed. By this last answer the defendants simply denied the execution by their testator of the several notes and the mortgage sued on as had been charged in the petition. This answer was not verified by oath.

On the trial the plaintiff introduced witnesses, by whom he proved the execution of the notes and mortgage sued on; after which he offered to read the several notes in evidence. The defendants objected to the notes as evidence in the case on the ground that they were not such notes as were described in the petition. This objection was overruled by the court and the defendants excepted.

The plaintiff then offered to read in evidence the mortgage referred to in the petition, to the reading of which, the defendants at the time objected. The court overruled the objection and the mortgage was read in evidence. To this ruling of the court the defendants also excepted.

The defendants offered no evidence, and no instructions or declarations of law were asked or given on the part of either plaintiff or defendants.

The court found the issues for the plaintiff and rendered a judgment in his favor for the amount found to be due on the notes sued on, and also entered a judgment foreclosing the equity of redemption on the mortgaged premises and ordering the same to be sold for the payment of the judgment, etc.

The defendants then, in due time, filed their several motions for a new trial and in arrest of the judgment. These motions were severally overruled by the court, when the defendants again excepted and appealed to this court.

The first error complained of by the defendants is, that the court erred in striking out the defendant's second amended answer upon the motion of the plaintiff. It is sufficient to say in reference to this objection, that when the answer was

stricken out by the court, no exception was made or saved by the defendants to the ruling of the court in that particular; but on the contrary, the defendants obtained leave of the court to file another amended answer, which was afterwards filed and a trial had thereon. By answering over, the defendants waived their right to avail themselves of any supposed error committed by the court in striking out the previous answer. This would be the case even if exceptions had been saved to the action of the court at the time. But no exceptions were saved in this case; the defendants, acquiescing in the action of the court, obtained leave of the court to file an amended answer which was filed. By this the defendants waived their right to have the action of the court in striking out their former answer reviewed by this court. (*Fuggle vs. Hobbs*, 42 Mo., 537; *Gale vs. Maupin*, 47 Mo., 276.)

It is next insisted by the defendants, that the court erred in rendering judgment in favor of the plaintiff on the evidence. The ground of this objection is, that by the notes the testator of the defendants promised to pay to the order of the plaintiff, describing the plaintiff in the note as follows: "D. A. Ely, president;" and that in the mortgage, he was described as president of the bank at Kirksville, from which it is insisted, that the suit should have been in the name of the bank—the bank being the real party interested. This objection does not appear to be well founded. The mere fact that the word "president" was placed at the end of the plaintiff's name was not sufficient to show that the plaintiff was not the real party in interest. The notes were made payable to the plaintiff, and the legal title to the land described in the mortgage was conveyed to the plaintiff to secure the payment of the debts due by the notes, and the suit was properly brought in his name.

The only remaining point insisted on by the defendant is, that there was a variance between the notes as described in the petition and the notes read in evidence, and that the defendant's objection to the reception of the notes in evidence was therefore improperly overruled by the court. The vari-

Smith v. Pollack.

ance insisted on is this: the petition in its caption, states the plaintiff's name to be David A. Ely, and that the defendant, by his promissory note, promised to pay to the order of plaintiff, etc.; while in the note it is stated, that the said William T. Porter "promised to pay to the order of D. A. Ely, etc." It will be seen that the variance between the petition and the notes read in evidence is, that the petition states that the promise was to pay to the order of plaintiff (David A. Ely); while in the note the promise is to pay to the order of D. A. Ely. This variance under our statute is not material. The statute provides, that no variance between the allegations in the pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his prejudice in maintaining his action or defense upon the merits; and that when it shall be alleged that a party has been so misled the facts shall be proved to the satisfaction of the court by affidavit showing in what respect he has been misled, and thereupon the court may order the pleading to be amended upon such terms as shall be just. (Wagn. Stat., 1033, § 1.)

It cannot be seen in the present case how the defendants were misled by the variance complained of. If they were misled they should have availed themselves of the remedy provided for them in the statute. Having failed to do so, they cannot now complain. (Fischer vs. Max, 49 Mo., 404; Turner vs. Chillicothe & D. M. C. R. Co., 51 Mo., 501.)

The judgment is affirmed; the other judges concur.

DAVIS SMITH, Respondent, vs. WALLACE POLLACK, Appellant.

1. *Bills of exceptions, when must be signed—Time, how waived.*—Bills of exceptions must be signed and appeals perfected during the term at which the cause is disposed of. A party having the right to insist on this rule may waive it, but the waiver must appear either by an entry of record or a stipulation filed.

Appeal from Adair Circuit Court.

Harrington & Cover, for Appellant.

11—VOL. LVIII.

Greenwood & Pickles, for Respondent.

LEWIS, Judge, delivered the opinion of the court.

This cause was tried on an appeal from a justice of the peace, and judgment was rendered in the Circuit Court for the plaintiff. No bill of exceptions was signed during the term at which the case was tried. At the next succeeding term, the defendant filed three motions: One accompanied by a bill of exceptions which the court was asked to sign and make a part of the record, one for leave to file an appeal bond, and one to quash an execution which had issued on the judgment. These motions being overruled, the defendant then perfected his appeal to this court.

The three motions were considered together, upon testimony introduced by both parties. It appeared from this, that, during the trial term, defendant's attorneys prepared a bill of exceptions, about which the parties disagreed, and which the judge refused to sign. Pending this disagreement, the court adjourned for the term. In the meantime, there was a verbal understanding between the attorneys, that a bill of exceptions might be signed and the appeal perfected, within thirty days. It was claimed for defendant, that plaintiff's attorney waived totally the execution of an appeal bond. No written stipulation was made at any time, nor was anything consummated, as to either bond or bill of exceptions. Complaints and counter statements were made, touching the temporary custody of the unsigned bill of exceptions by either party at different times, and the alleged unfairness of plaintiff's attorneys in lulling the vigilance of defendant's by verbal promises to take no advantage from delay. This is the sum and substance of a voluminous record, upon which we are asked to allow to the defendant all the benefits of an appeal regularly taken, and a bill of exceptions signed at the proper time.

Such a demand cannot be yielded to without a violation of law. The statute is imperative, that the bill of exceptions must be signed and the appeal perfected during the term of the trial.

Pattee v. Thomas.

In practice, the party whose right it is to exact these timely observances may waive them. But the waiver must appear in the record, either by an entry among the proceedings of the court, or by a stipulation filed. Otherwise, no court is authorized to recognize the existence of any such waiver, and the law must be strictly obeyed.

It follows that the court below committed no error in overruling the defendant's motions, and its judgment will be affirmed; the other judges concur.

—○—

DAVID R. PATTEE, by his next friend, JAMES G. BLAIR, Respondent, vs. JOHN THOMAS, Appellant.

1. *Adair county Probate Court—Jurisdiction—Act of Feb. 11, 1847.*—The 3rd section of the act passed Feb. 11, 1847, had the effect of transferring to the Probate Court of Adair county all the jurisdiction relative to matters of probate and guardianship, which was conferred by the General Statutes upon County Courts.
2. *Guardianship—Derivation from father of minor's estate determined by court having jurisdiction.*—The question whether the estate of a minor was derived from his father, as affecting the right of the father as natural guardian, to sell the estate of the minor, is one to be decided by the court having charge of the estate, and this having been decided by that court, proof to the contrary, at a subsequent period, will not affect the jurisdiction of the court.
3. *Guardians and curators—Minors, lands of—Sale at private sale—Probate Courts.*—Probate Courts have power to order the sale of lands of minors at private sale. This power was not taken away by the statute of 1851 and 1855, touching guardians and curators. (R. C. 1855, 826-7, §§ 25, 26, 27; *McVey vs. McVey*, 51 Mo., 406 cited and affirmed.)
4. *Guardianship—Sale of lands of minors—Inventory—Jurisdiction.*—The failure of the guardian to file an inventory, list and appraisement of his ward's property, does not deprive the Probate Court of jurisdiction, nor render void a sale made under the order of the court. (*Overton vs. Johnson*, 17 Mo., 442, cited and affirmed.)
5. *Guardianship—Minors, lands of—Private sale—Advertisement.*—Sections 24, 25 and 26, Rev. Code 1845, pp. 86, 87, requiring advertisement of sales of lands of minors, does not apply to private sales by a guardian.
6. *Guardianship—Minors, lands of—Sale—Notice.*—The administration law of 1851 did not require notice of sale of lands of minors by their guardians to be given, as in case of sales of lands by administrators.

Pattee v. Thomas.

7. *Guardianship—Lands of minors, sale of—Approval by court.*—The records of a Probate Court, showing a report of a sale of lands of minors by the curator, and his oath thereto, and an entry showing that the court received the report, and ordered the curator to account for the proceeds according to law, is sufficient evidence of approval of the sale.
8. *Judicial sales—Irregularities—Title of purchaser.*—Slight irregularities are not sufficient to overturn the title of a purchaser at a judicial sale, where the court had power to order the sale, and there is no pretense of fraud, especially after the lapse of a long period of time.

Appeal from Macon Circuit Court.

Dryden & Dryden and B. G. Barrow, for Appellant.

I. If the facts give the defendant an equitable title, upon that title, he can defend himself against the action of ejectment. (*Harris vs. Vineyard*, 42 Mo., 572; *Hayden vs. Stewart*, 27 *Id.*, 288.)

II. The Adair Probate Court succeeds in probate matters to all of the jurisdiction of the County Court. (Rev. Laws of 1845, § 13, p. 331; Laws of 1847, § 3, p. 38.)

III. It was averred in the petition for the order of sale, that the property was derived from the parent, and the court proceeded upon the theory of the truth of that averment in making the order of sale. If the fact accorded with the theory the omission to give bond was not even an irregularity. (*Wolf vs. Robinson*, 20 Mo., 459.)

The giving of bond was not a jurisdictional fact—it was a fact that affected the regularity, merely, of the proceedings. The father being by law the natural guardian, appearing and bringing the property before the court, conferred jurisdiction of the property upon the court.

IV. The requirement that the application for the order of sale should be accompanied by an inventory, list of debts, etc., has no application to guardians, nor is notice required in case of sales by them. The statute expressly provides for sales of real estate at private sale. (R. L. 1845, § 25, p. 86.)

V. It is inconceivable that the court would have distributed the proceeds of the sale without first approving the sale. The act of ordering distribution of the proceeds of the sale must

be taken and held to be an approval of the sale whose proceeds are thus ordered to be distributed. The use of the word "approve" is not necessary to the validity of the order of approval. Whatever expresses the mind of the court, that the sale meets its approbation, is enough. Every reasonable intendment should be made in support of the rights of purchasers at judicial sales. (*Cabell vs. Grubb*, 48 Mo., 353; *Strong vs. Drennan*, 41 *Id.*, 289.)

Jas. G. Blair, for Respondent.

I. The Probate Court did not have jurisdiction to sell:—1st. Because the act creating it did not give it power, either express or implied, to order the sale of the real estate of minors for any purpose whatever. (Acts 1847, p. 38, § 3.)—2d. Because the proceedings being that of the natural guardian to sell without bond, under § 1, p. 547, Stat. 1845, the petition of the guardian should aver the facts to give the court jurisdiction, and the record show that proof thereof was made, neither of which was done in this case. Nothing can be presumed against plaintiff, he being a minor. *Coram non judice*.—3d. Whether it be stated in the petition or record or not, the fact required by said 1st section, Stat. 1845, p. 547, must exist. If it does not exist, though the petition and record averred it did, the court can have no jurisdiction. The plaintiff, even if the petition and record averred the fact, (being a minor) can at any time call the record in question. In this case he has assumed the burden of proof, and shows clearly that the fact essential to jurisdiction did not exist; that his money and not his father's entered the land. The evidence upon this point preponderates in his favor.

II. The proceedings must be held null and void:—1st. Because the petition was not accompanied by a true account of the guardianship, list of debts due ward, and an inventory of estate, etc., and not verified by affidavit as required by law. (Acts 1851, § 1, p. 217; Stat. 1845, § 21, p. 85.)—2d. Because no notice of application or sale being given, all competition in bidding was prevented; and though a private sale, no good

reason exists for not giving notice of that kind of sale as of public sale, competition in one is as necessary as the other. —3d. Because the report of sale was not approved by the court. (Acts 1851, § 2, p. 217; Stat. 1845, § 33, p. 87; 48 Mo., 148; on all points, see 25 Mo., 584; 41 Mo., 289.)—4th. Equity does not enforce contracts against those who are not parties to them and have nothing to do with the consideration; nor will it aid the defective execution of statutory powers. (*Moreau vs. Detchemendy*, 18 Mo., 522; *Moreau vs. Branham*, 27 Mo., 351; *Hubble vs. Vaughn*, 42 Mo., 351; *Abernathy vs. Dennis*, 49 Mo., 468; *Allen vs. Moss*, 27 Mo., 354; *Chauvin vs. Wagner*, 18 Mo., 531.)—5th. Nor will equity compel an administrator or heir to make a deed for real estate sold by administrator. (*Speck vs. Wohlein*, 22 Mo., 310.)

NAPTON, Judge, delivered the opinion of the court.

This action is an ejectment brought by David R. Pattee, by his next friend, to recover forty acres of land in Adair county.

The defense relied on and set forth in the answer, is, that Benj. F. Pattee entered this land at the U. S. land office, in the name of his son, the plaintiff, intending it as an advancement; that in 1855 the father, who was guardian of the plaintiff, then under fourteen years of age, and also curator of his estate, applied to the Probate Court of Adair county for an order to sell said real estate, for the education of his ward, the plaintiff; that the court accordingly made an order authorizing said Benj. F. Pattee to sell said land at public or private sale; that afterwards said Benj. F. Pattee caused the said real estate to be appraised by three disinterested householders of the county, who appraised it at \$120, and then sold the same to the defendant, at \$3 per acre (\$120) and agreed to make a deed, and the defendant paid the purchase money. Afterwards, as it is averred, in the same year, in May, 1855, said Pattee made a full report of his proceedings to the said Probate Court, and said report was approved.

Pattee v. Thomas.

It is further stated, that said defendant went into possession and made valuable improvements, but that said Pattee failed to make him a deed that would be good and sufficient to pass the legal title. It is further averred, that the plaintiff received from his father (the guardian) the full benefit of said purchase money, so paid by defendant to plaintiff's guardian, and that in addition to that, he received his share of his father's estate, upon his death intestate, to the value of one thousand dollars. And the defendant concludes with a prayer, that the contract of sale made by said Benj. F. Pattee may be specifically executed, and that the court vest in defendant the rights, title and interest of the plaintiff to this real estate.

The replication denies or ignores these allegations. On the trial the plaintiff read in evidence a patent from the U. S. to himself, David R. Pattee, dated May 1, 1854, and rested.

The defendant then testified in defense of his equitable title, that he bought the land of plaintiff's father, in 1855, for \$3 per acre in gold, which he paid; that he bought in good faith, believing that the father, under the orders of the Probate Court, had authority to sell; that he consulted various eminent lawyers, and being assured of the validity of his title, he proceeded to make his improvements on the land in connection with his adjoining farm. There is nothing further in his testimony of importance.

Another witness was called, who stated that he was an attorney at law, and acted for B. F. Pattee, guardian, etc., in the matter of procuring an order for the sale; that he filed the petition, and the court refused to grant it, because Pattee had not given bond as guardian; and thereupon said Pattee was sworn, and stated on his oath, that the money with which the land was entered was his. And his daughter seems to have been also examined by the Probate Court, and she also testified to the same thing; and the court thereupon appointed said B. F. Pattee to be the guardian for said minors, and decided that no bond was necessary; and there were some other reasons given by Pattee, which need not be stated.

The probate judge was then called, who gave a history of the transaction, but as judges speak only through their records, it is useless to note his statements.

The defendant then introduced the records of the Probate Court. 1st. April Term, 1855. "The undersigned, your petitioner and natural guardian and father of the following named heirs, with their respective ages respectively and severally annexed: Julia H. Pattee, aged nineteen years and nine months; Jno. W. Pattee, aged ten years and five months; and David R. Pattee, aged seven years and six months, respectfully represents that a legal guardian ought to be appointed.

"Your petitioner further states, that the said minor heirs aforesaid, own a lot or parcel of land, lying and being in the county of Adair, and State of Missouri, which ought to be sold, for reasons hereafter to be set before this honorable Court; therefore your petitioner asks for the appointment of a guardian, etc." This was marked, "Filed April 2, 1855. B. G. Barrow, Judge."

Then the record of the Probate Court shows further: "In the Probate Court; April Term, 1855. The undersigned, your petitioner and guardian and natural curator of Julia H. Pattee, B. F. Pattee, Jr., John W. Pattee and David R. Pattee, minor heirs of said guardian, respectfully represents that he has entered a lot or parcel of land lying and being in the county of Adair, and State aforesaid, in the names of the minor heirs aforesaid, and for their exclusive benefit; that he at or about the same time, entered a parcel of land for himself and in his own name for his benefit. Your petitioner states that he entered said land inconsiderately without regard to the relative situation of said lands. Your petitioner further states that he designs selling his own lands, and if sold the sale will materially impair the value of the lands of the minor heirs. Your petitioner further states that he now has a standing bid for the entire lot of lands above referred to, provided he can be authorized legally to convey title, etc. The petitioner states further, that he is desirous of giving the

Pattee v. Thomas.

minors aforesaid a liberal education, provided he can get the means to do so. And the petitioner further states, that if these lands were sold and a part of the proceeds applied to the education of the minor heirs, which is really necessary, and the residue vested in real estate judiciously selected, the heirs would be materially benefited, etc. Therefore your petitioner prays the court to authorize him to bargain, sell, convey, etc., all the right, title and interest of the minor heirs aforesaid, (to be applied as aforesaid) in and to the following real estate." (Here follows a description of the land in controversy.)

The next paper from the record is this: "State of Missouri, County of Adair. We, John B. Gallyon, Benj. Murphy and Z. B. Greenstreet, having been appointed by order of the Probate Court of Adair county to appraise the following described land belonging to the heirs of B. F. Pattee, Sen., to-wit: (here is a description of the land in dispute) and after examining the same, do appraise the above land to be worth \$4 per acre." Sworn to and subscribed and marked, approved and filed July 2. 1855. B. G. Barrow, Judge.

The next copy of the record of the Probate Court is this: "B. F. Pattee, natural guardian of Julia H. Pattee, B. F. Pattee, Jr., Jno. W. Pattee and David R. Pattee. In the Probate Court of Adair county, Mo., July Term, 1855. The undersigned, natural guardian of the above named heirs, begs leave to submit the following report, in conformity to an order by the honorable Probate Court of Adair county, State of Missouri, at its April Term, 1855. I proceeded to bargain and sell all of the real estate belonging to the above named heirs, situate, lying and being in the county of Adair, State of Mo., known and described as the south east quarter, etc., unto John Thomas, of the State of Iowa, for the sum of \$3 per acre. Said sale was made and perfected on the 21st of April 1855, all of which is submitted, etc. Signed, B. F. Pattee."

There is appended an account of sales of Julia's land, of B. F. Pattee's land, of his other children's land, but that is

of no use in this case. But there appears this certificate: "State of Mo., County of Adair, B. F. Pattee, natural guardian of the within named heirs, makes oath and says, that the foregoing report and matters as stated therein, are true. B. F. Pattee. Subscribed and sworn to before me, July 2, 1855. B. G. Barrow, Judge."

Then there appears on the record this: "The court receives the report of J. W. Gallyon, Z. B. Greenstreet and Benj. Murphy, appraisers to appraise the real estate of Julia H. Pattee and other minor heirs, and the report of Benj. F. Pattee, guardian for said minors, of sale of real estate. Whereupon, the court charges said guardian, as follows: For Julia H. Pattee, with the sum of \$240; Benj. F. Pattee, \$240; David R. Pattee, \$240; John W. Pattee, \$120, which said Benj. F. Pattee is to account for according to law."

Then the following record is produced from the Probate Court: "Now at this day, March 31, 1856, comes Benj. F. Pattee, guardian for Julia H. Pattee, David R. Pattee, John W. Pattee, and Benj. F. Pattee, Jr., and reports that full payment of the purchase money for the land sold to Thomas has been made to him."

A record of the proceedings of the County Court of Adair county in probate was then read, dated in Feb. 1870. The object of this proceeding was to procure a deed to the defendant, and the Probate or County Court ordered it. The testimony of several witnesses seems to be entirely beside the case, and need not be recited. The Circuit Court gave judgment for the plaintiff, and this judgment is here for review.

It is apparent from the statement, that the judgment of the Circuit Court was based on the supposed invalidity of the sales made in accordance with the orders of the Probate Court. The proceedings of the Probate Court, and the sale of the guardian thereunder were treated as nullities, and the question here is, whether we will regard them in that light, and allow the plaintiff to recover against the claims of the purchasers under the judicial sale.

The first objection made to the title of the defendant, is to the jurisdiction of the Probate Court of Adair county. That was conferred by an act passed Feb. 11, 1847. The third section of that act is in these words: "The Probate Court of Adair county shall have exclusive original jurisdiction in all cases relating to the probate of wills, granting letters testamentary and of administration, and revoking the same, appointing or displacing guardians or curators, or orphans, minors and persons of unsound mind, in binding out apprentices, and in the settlement and allowance of accounts of executors and administrators, guardians and curators; to hear and determine all disputes, whatsoever, respecting wills, the right of executorship, administration or guardianship, or respecting the duties or accounts of executors, administrators, guardians or curators, etc."

The manifest object of this law was to transfer to the Probate Court, created by it, a jurisdiction corresponding with that previously possessed by the County Court.

The 13th section of the general law of 1845, declared, that "the several County Courts shall have exclusive original jurisdiction in all cases relative to the probate of last wills and testaments, the granting letters testamentary and of administration and repealing the same, appointing and displacing the guardians of orphans, minors and persons of unsound mind, in binding out apprentices and in the settlement and allowance of accounts of executors, administrators and guardians, to hear and determine all disputes and controversies whatsoever, respecting wills, the right of executorship, administration and guardianship, or respecting the duties or accounts of executors, administrators or guardians, etc."

The Probate Court of Adair county succeeded to the jurisdiction of the County Court in terms sufficient to authorize that court to do whatever the County Court had been authorized to do in sales of guardians. But the second objection is, that the father, being natural guardian in this case, could not sell without proof that the estate was derived from him, and that the Probate Court had no jurisdiction, unless such a

case was proved. The first section of the act of 1844, is this: "In all cases not otherwise provided for by law, the father, while living, and after his death and when there shall be no lawful father, then the mother, if living, shall be the natural guardian of their children, and have the custody and care of their persons, education and estates, and when such estate is not derived from the parent acting as guardian, such parent shall give security and account as other guardians."

The petition in this case in the Probate Court, stated that the petitioner had entered this land for his children, and in their names, thereby clearly indicating that he had furnished the money. Whether he did so supply the money, or not, was a question of fact for the consideration of the Probate Court. It seems now from the testimony, that he did not, although the fact appeared otherwise in the Probate Court at the time of the order, and that the grand-father of the children furnished the money. But that was a fact for the consideration of that court, and does not affect the jurisdiction of the court. (*Overton vs. Johnson*, 17 Mo., 446.)

The principal objection urged to the validity of this sale, however, is, that the Probate Court had no authority to order a private sale, after the passage of the act of 1851, which was subsequently embodied in the revision of 1855. That question was decided in the case of *McVey vs. McVey*, 51 Mo., 418) where a private sale made subsequent to the act of 1851, was held valid.

The objection that no notice of the intended application was given, as required by the administration law, is untenable. We presume that the act of '51 never intended to make the administration law any further applicable to guardians than would be consistent with the different positions occupied by administrators and guardians. To whom, and for what purpose, could a notice be required in the case of guardians? It would concern nobody but the minors, and they are in court already through their guardian, the only channel through which they can communicate with the court.

The case of *Overton vs. Johnson* and others, also answers the objection of the neglect of the guardian to file an inventory, which is required in applications by administrators to sell real property on account of a deficiency of personal estate. Judge Gamble in that case, observes: "It is true that the statute directs, 'that when such petition, and such lists and inventories shall be filed, the court shall order that all persons interested in the estate should be notified, etc.'—but the provision is only designed to carry out the direction of the previous section, and does not affect the question of jurisdiction. The jurisdiction is acquired by filing a petition, praying the court to do an act or make an order, which, under the statute, the court is competent to do. Whether the petition is in proper form, or sets forth sufficient facts, or is accompanied with the proper evidence, the court will decide in the exercise of its jurisdiction."

That being the case of an application by an administrator to sell lands on account of a deficiency of personal assets, a statement of the condition of the estate was manifestly of importance; but in the case where the applicant is the father and natural guardian of the infant children, and asserts that the land was entered by himself in the name of his children, it might be presumed, and indeed is the natural implication of his statements, that a sale would enable him to give his children an education, that they had no other property.

The applicability of sections 24, 25 and 26 of the act concerning administration, (Rev. Co. of 1845, pp. 86, 87) to a private sale by a guardian is not perceived. It is clear that these sections relate to public sales. Administration sales at private sale are provided for by §§ 31, 32 and 33. Of what avail would newspaper advertisements, for six weeks, or hand-bills be, in case of a private sale, which indeed, in this case the guardian in his petition stated could be effected without loss of time. In this case the report of the sale was made at the term ensuing the order, and no objection is made on that account.

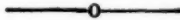
But it is said the sale was not approved by the court, and this undoubtedly was necessary under the law of 1851 and 1855. The record of the Probate Court, at its July Term, 1855, is as follows: "Be it remembered, that at a term of the Adair Probate Court, begun and held at the court house, in the town of Kirksville, on the 2d day of July, 1855, the following proceedings were had: 'B. F. Pattee, natural guardian of Julia H. Pattee, Benj. F. Pattee, Jr., John W. Pattee and David R. Pattee, etc. The natural guardian of the above named heirs, begs leave to submit the following report, in conformity to an order made by the honorable Probate Court of Adair county, State of Mo., at its April Term, 1855. I proceeded to bargain and sell all the real estate belonging to the above named heirs, situate, lying and being in the county of Adair, known and described as—(here follows a description) unto John Thomas, of the State of Iowa, for the sum of \$3 per acre. Said sale was made and perfected on the 21st day of April, 1855, all of which is respectfully submitted. B. F. Pattee, natural guardian, etc.'"

Then follows a statement of the sales and prices, amounting in all to \$800. Then follows an oath to the truth of the above, and that the money was all paid, except one dollar.

Then follows this entry: "The court receives the report of J. W. Gallyon, Z. B. Greenstreet and Benj. Murphy, appraisers to appraise the real estate of Julia H. Pattee and other minor heirs; and the report of Benj. F. Pattee, guardian, etc., of sale of real estate. Whereupon the court charges the said guardian as follows:" Here follows a distribution of the proceeds of the sale to the different minors, and said B. F. Pattee is ordered to account for the same according to law. It is true there is no formal entry of approval in this case, but the orders of the court cannot be understood in any reasonable way except as a virtual approval of the report and sales. The court receives the report and orders the money to be charged to the guardian, for the benefit of the minor children. It was impossible for the court to distribute the proceeds of the sale and make the orders which were made without a previous approval of the sale.

Such slight irregularities as these are not to overturn the title of purchasers at a judicial sale, which the court had power to order, and in which there is no pretense of fraud, either on the part of the purchaser or guardian, especially after the lapse of eighteen years.

The judgment will be reversed and the cause remanded; the other judges concur.



THE COUNTY COURT OF ST. LOUIS COUNTY, Appellant, *vs.* WILLIAM D. GRISWOLD, *et al.*, Respondents.

1. *When courts may declare acts of legislature void.*—The courts cannot declare an act of the legislature void, no matter how unjust or impolitic it may be, unless it clearly conflicts with specific provisions of the constitution.
2. *Taking private property for public use—Power of the courts to restrain the legislature.*—The courts have power to determine whether the use for which private property, authorized by the legislature to be taken, is in fact, a public use, but if this question is decided in the affirmative, the judicial function is exhausted; the extent to which such property shall be taken for such use, rests wholly in the legislative discretion, subject only to the restraint that just compensation must be made.
3. —. *A park for the inhabitants of a county is a public use.*—The legislature of Missouri, authorized the appropriation of land for a public park for the benefit of the inhabitants of St. Louis county, located in the eastern portion of said county, near to, and outside of, the corporate limits of the city of St. Louis: *Held*, that this was a "public use," notwithstanding the fact that it would be chiefly beneficial to the inhabitants of the city, and that the act was not unconstitutional.
4. *Municipal indebtedness—Constitutional ordinance construed.*—That clause of the constitution of Missouri (Art. 11, § 14) which prohibits the general assembly from authorizing any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto—does not prohibit the legislature from authorizing a county to create a debt for the purpose of establishing a public park for the benefit of its inhabitants.
5. *Power of legislature to establish board of park commissioners.*—The legislature of Missouri has power to establish a board of park commissioners, one-half to be appointed by the county court, and one-half by the circuit court of the county, for the purpose of constructing and managing a park for the benefit of the inhabitants of the county

6. *Taking private property for public use—Legislature may not arbitrarily fix value—Acts valid in part and void in part.*—An act authorizing private property to be appropriated for the establishment of a public park, contained a proviso, "that in all cases, the assessment of the county assessor for the year 1873, shall be taken as a guide in fixing the value of the property to be condemned or appraised:" *Held*, that if it was intended by this proviso, that the assessment made in 1873, should be taken as the measure or standard in fixing the value for compensation, then it would be clearly unconstitutional and void. "Property can only be taken or appropriated upon making just compensation. What is just is a matter of inquiry, ascertainable by either appraisers or a jury, upon evidence furnished in the case. No law can arbitrarily fix a value on property, and tell the owner he shall take that." But since an act may be valid in part and void in part, and since if this proviso were eliminated, there would still be adequate provisions in the act for its enforcement, *Held* also, that it may be rejected and the remaining portions of the act permitted to stand.
7. *Taking land for a public park—Vesting title in the "People of the County."*—An act of the legislature providing that the title to land condemned for a public park shall vest in the "people of the county," is not void from the fact that the "people of the county" do not constitute any recognized legal or political body. The terms "people of the county," and "the county," may be regarded as interchangeable.*

Thomas C. Reynolds, for Appellant.

I. As to the park's being of "public use". The whole attempt of respondents' counsel as to this point, is to prove by their own assertions and reasoning, that this law is unjust and oppressive upon a portion of the people of the county and that should it be sanctioned, other similar laws may hereafter be passed. There is no pretense, nor the slightest allusion made in their long argument on this point, to the violation of any specific provision of the constitution. But there is no power in the court to remedy injustice or oppression in a legislative body unless some constitutional provision is violated. (*Hamilton vs. St. Louis County*, 15 Mo., 3; *State vs. State Line Railroad*, 48 Mo., 471; *Cooley Con. Lim.*, pp. 159, 162, 167, 2 Ed.) It necessarily follows that this court must clearly see that the act manifestly conflicts with some "specific provision of the constitution" before it has any authority to declare it void, however unjust or oppressive it may be.

*I acknowledge myself indebted for this syllabus to the Central Law Journal, Jan., 1875.—Reporter.

"The necessity for appropriating private property for the use of the public, or of the government is not a judicial question: * * * The necessity of taking private property for public use is to be determined by the legislature, and it may, by statute, directly and at once, designate the property to be appropriated, and the purpose of the appropriation, or delegate the power to officers or corporations." (*People vs. Smith*, 21 N. Y., 597; *Vareigne vs. Fox*, 2 Blatchf., 95; *Dickey vs. Tennison*, 27 Mo., 376; *Township Board vs. Hackmann*, 48 Mo., 245; *Cool. Con. Lim.*, 537; *Id.*, 530, Title "Purpose.")

The right of eminent domain is not conferred by the constitution. It exists as a necessary attribute of sovereignty in every government. (*Cool. Con. Lim.*, 424, and note 1 and authorities there cited; *Bonaparte vs. Camden & Amboy R. R.*, Bald., 205; *Barringer vs. Edman*, 14 Har. [Pa.] 129; *E. St. Louis vs. St. John*, 47 Ill. 463.)

The constitutional provisions confining the exercise of the right to a public use, and upon paying compensation, are restrictions upon the right.

We are, therefore, to see whether there is any express provision of the constitution which restricts and forbids the legislature to authorize counties to establish public parks when, in the judgment of the general assembly, the number of people in the county, that is, the whole county, renders it useful or beneficial to the people thereof, and as it is not pretended there is any such restriction, the power exists.

"The incompatibility must not be speculative, argumentative, or to be found only in hypothetical cases or supposed consequences. It must be clear, decided and inevitable, such as presents a contradiction at once to the mind, without straining either by forced meanings or consequences too remote. It is the constitution that must be violated, and not any man's opinions of right or wrong, or his principles of natural justice. These are uncertain standards of legislative power, and must be referred to the discretion of those to whom the people have given that power, and to whom they must answer for an

abuse of it." (*Livingstone vs. Moore*, 7 Pet., 663, 4; *Brooklyn Park vs. Armstrong*, 45 N. Y., 236; *Owners vs. Albany*, 15 Weed, 376-7.)

The legislature and the governor, by establishing Forest Park for the people of St. Louis county, decided that it was of "public use" to the whole people of the county, as a body; and this decision of the two other branches of the State government is not subject to review by the third co-ordinate branch, the judiciary.

Even were it subject to such review, the facts, of which the court will take judicial notice without testimony of witnesses, clearly establish that that park is of public use, beneficial to the whole people of that county.

II. The Forest Park act is not contrary to section 14 of article XI. of the State constitution, which says that "the general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to, any company, association or corporation, unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

The first question to be considered, is whether that board is a company, association or corporation.

Three of its members are nominated by the County Court, and confirmed by the Circuit Court; three are nominated by the Mayor of the city of St. Louis, and confirmed by its City Council; and the seventh is the presiding justice, for the time being, of the County Court. Thus a majority of the board is dependent for appointment on the County Court, or (in the case of its presiding justice) on the direct choice of the voters of the county; and the minority is appointed by the Mayor of the City of St. Louis, which contains nine-tenths of the population of the county.

The board of Forest Park commissioners is destitute of every ear-mark denoting a company, association or corporation. It has no perpetual succession, but may, at any time, be abolished by the legislature. It possesses no property and holds no money; for the park itself belongs to the people

of the county, even the possession of it remains with the County Court, (§ 3 of act) and all park moneys are to be deposited with the county treasurer. (§ 6 of act.) They cannot touch a cent of those moneys without the approval of the County Court, and they must semi-annually report all their proceedings to that body. The act does not give them even a power "to sue and be sued," an indispensable attribute of every company, association or corporation, as distinguished from officers, agents or employees of the government. In the act, the legislature evidently does not regard the board as a corporation, for there is not the slightest provision that, before it may act, it must be duly organized under the general corporation law.

III. The opposing counsel contend that the park act is unconstitutional, because it provides for taking private property, not at its just value, but solely at the valuation placed on it in the tax assessment of 1873.

The words of the act: "In all cases, the assessment of the county assessor for the year 1873, shall be taken as a guide in fixing the value of property to be condemned or appraised," simply mean that the assessment was to be taken as one guide, or some guide, but not as the only or conclusive guide.

This construction is still clearer, from an examination of the whole act. The appointment of appraisers, who are to be sworn to fix the value of the property themselves; the provisions, that either party might require a jury in lieu of the appraisers, that the owner might move the court to exercise its discretion in setting aside the appraisement or verdict, prove beyond cavil that the assessment was not to be the conclusive and only guide.

But even were the act susceptible of the forced construction put upon it by the opposing counsel, the only result would be that so much of it as made the assessment of 1873 conclusive as to the value of property would be void, and the remainder of the act, perfect in itself, could be carried into effect.

It makes no difference whether the supposed unconstitutional provision is in a separate section, or forms part of a

section otherwise constitutional. Judge Cooley says (p. 178), "The constitutional and unconstitutional provisions may even be contained in the same section, and yet be perfectly distinct and separable, so that the first may stand though the last fall." Strike out the proviso from the end of § 2 of the Forest Park act and yet the remainder is "complete in itself and capable of being executed, in accordance with the apparent legislative intent."

IV. The Forest Park act is not inoperative because it directs the title to the land composing the park to be vested in the "people of the county of St. Louis," and not in the county of St. Louis, the ordinary legal designation of the political sub-division in which the park is located.

Taking for argument's sake, the position that the expression "people of the county of St. Louis" was inadvertently placed in the act, and that the name of the county alone should have been used, it is nevertheless clear that a conveyance to its people would enure to the benefit of the county as a *quasi* corporation. (*Carder vs. The Com'rs of Fayette county*, 16 Ohio St., 351; *State vs. Piatt*, 15 Ohio, 23; *The Trustees of Green Township in Scioto County vs. John Campbell*, 16 Ohio St., 11; *Hornbeck's Ex. vs. The American Bible Society*, 2 Paige's Chancery, 133; *Potter vs. Chapin*, 6 Paige, 649.)

Our own legislature has recognized by statute in respect to county contracts, the principle sustained in the above decisions. It enacted, (Wagn. Stat., 407) and the law has been for very many years among our statutes, that "all notes, bonds, bills, etc., whereby any person shall be bound to any county, or the inhabitants thereof," shall vest title in the county itself.

Moreover, it is a well known doctrine of equity jurisprudence, that no trust shall fail for want of a trustee, and the court, in such a case, will appoint one. Now it is beyond question that a title to Forest Park might be made to the people, or public, of St. Louis county, by the intermediation of a trustee. The park act, on its face, declares the park to be established for the use and benefit of the people of St.

Louis county. Therefore, if so much of the act as gives the St. Louis County Court possession of the park, and appoints commissioners to facilitate the use of it by its owner, the people, should be invalid, all that is needed is that a court of equity should appoint a trustee to assume the legal title rather than that the trust should fail. (*Mackay vs. Dillon*, 7 Mo., 7; *Lebois vs. Brammel*, 4 How., 457; *Vasquez vs. Ewing*, 24 Mo., 31.)

In fact, the ownership of land by the people themselves, by the public, is the very highest and most complete kind of property. It is the *dominium eminens*. (*Cool. Con. Lim.*, 524, n.; *Tollard's Lessee vs. Hagan*, 3 How. 223.)

John M. Krum, for Appellant.

I. The act of 25th March, 1874, establishing Forest Park, is not in any particular in contravention of the constitution of Missouri.

That the general assembly has constitutional power, by legislation, to exercise the right of eminent domain, and that the general assembly may delegate this power, will not, I presume, be questioned or denied. It is a sovereign right of the State, and it attaches to the State as the right of property attaches to man. The right of eminent domain is a necessity of government.

The public use to which legislation of this character is directed, may spring out of various considerations, municipal, sanitary, or even public convenience.

These considerations are addressed to the general assembly (not to the court,) and the legislature, in the first instance, exercises its discretion, whether or not to exercise its power in the matter of eminent domain in every case.

The reasons or considerations which induce such legislation, need not be stated on the face of the law, which makes provision for a public use. After the enactment of such a law, the door is closed to all inquiry into matters or agencies which prompted its enactment.

The first paragraph of the act declares that "a public park is hereby established for the people of St. Louis county." A public park *ex vi termini*, expresses a public use. This is the very subject matter embraced in this act of the legislature—the county of St. Louis is a sub-divided portion of the State, and the welfare of the people of the county is a legitimate subject to receive the attention and action of the general assembly. The considerations which prompted this legislation, whether it was in view of municipal or sanitary purposes, or with a view to the public convenience, are now matters past finding out. The presumption, however, is that the end in view by the enactment of this law, is the public good, and this presumption supports the law.

Necessarily, in the very nature of things, there is a limit to judicial investigation and control. This court deals with a statute as it finds it on the statute book. The general assembly deals with subjects of legislation in its discretion, with a view to the public good and the ends of justice, restricted only by the limitations of the constitution.

Unless the act of the legislature is clearly evasive or there is a palpable usurpation of authority on the question of public use, the discretion of the legislature cannot be controlled by the court.

The taking of private property for public use is an act of the political power of the State. The necessity or utility of the taking is a question for the legislative department of the government and exclusively in the control of that department.

The whole question of expediency or in expediency, and whether the law be or be not for the welfare of the State is left with the legislature.

The necessity for an appropriation of land by the legislature in the exercise of the right of eminent domain may not be questioned. If the use to which the lands are to be put is public, the legislature is the sole judge of the necessity.

As the legislature is the sole judge of the public necessity, which requires or renders expedient the exercise of the power of eminent domain, without the owner's consent, so it is the

exclusive judge of the amount of land or estate in the land which the public end to be subserved requires shall be taken.

What is a public use is for the legislature to determine in the first instance. (*Coster vs. Tidewater Co.*, 3 C. E. Green, [N. J.] 518; *Connor vs. Reed*, 4 Pick., 460-3; *Speer vs. Blairsville*, 50 Penn., 150; *Olmsted vs. Camp*, 33 Conn., 532-552; *Verick vs. Smith*, 5 Paige, 137; *Hartwell vs. Armstrong*, 19 Barb., 166; *Cochran vs. Gorley*, 20 Wend., 365; *Anderson vs. Tuberville*, 6 Caldwell, 150; *Concord R. R. vs. Greely*, 17 N. H., 47; *Scudder vs. Trenton Falls Co.*, 1 Saxton, 695; *Fowler's Case*, 53 N. Y., 60; 2 Dillon Mun. Corp., 555; *Horton vs. S. & F. Nail Co.*, 8 Am. L. Reg., 179.)

II. The limitation or restriction of § 14, Art. XI. of the Const. is cited against the law in question. This act does not in terms, nor by implication, authorize the county to become a stockholder in, or to loan its credit to any company or corporation. The inhibition contained in this clause of the constitution, has no application to this case. The application attempted is a complete perversion of it. This case is in no sense like the case of Phelps county. There is no analogy between the two.

III. The condemnation of land for the purposes of the park, may be treated as a public easement, and no grantee need be named, nor is a grantee necessary to the complete establishment of such easment.

But if it is essential to the validity of the act that a grantee should be designated, I maintain that a grantee is designated and provided for in the law, not in terms, but by construction of the act itself. The county of St. Louis is a corporation and competent to take and hold real estate by gift, devise or grant. The county court (as is stated and claimed on the other side,) is established for the transaction of all county business. The condemnation or purchase of land for a park, under the act in question, I assume is "county business," and if the grant or title to the land is made to the county of St. Louis it will be valid, and if made to the people of the county of St. Louis, it will by intendment be construed to be a grant to the county itself.

Again, if it was intended by the general assembly that the title to the condemned land should be vested in some party, it is manifest that such vestment was intended as a trust for the county of St. Louis. Such must have been the intention of the general assembly. Now, a trust never fails for want of a trustee. If the party selected is incompetent to take title or act as trustee—if he dies, or becomes a felon or civilly dead, a court of equity will appoint a trustee, and by its decree vest its appointee with the title, and all authority needed in the premises. Therefore, if “the people of the county of St. Louis” is a nonentity, and cannot take title and execute the trust—and if the county itself cannot take and execute it, then a court of equity will appoint a trustee and thus prevent a failure of the trust.

Glover & Shepley and T. T. Gantt, for Respondents.

I. The court did not err in holding “The Act to establish Forest Park,” etc., (Sess. Acts, 1874, p. 371) unconstitutional and void upon its face. Private property can only be taken against the will of the owner for some “public use.”

If there be a public use or necessity demanding the appropriation of the property, the legislature may or may not, in its discretion, employ the right of eminent domain to take it, but if there be no such use or necessity, the right of eminent domain, though granted to the legislature, cannot be used. The power of the legislature in the exercise of the eminent domain, is limited to the case of a public use. If the public use appears as a fact, the legislature may authorize the taking of the property by the force of eminent domain, on “making just compensation.” (Const., Art. 1, § 16.) But the courts must ultimately pass upon the question of “public use,” or the constitutional provision would have no effect. When the legislature has authorized the taking of private property for what it deems a public use, the courts have jurisdiction to investigate that question; to inquire into the facts, and unless the court finds the purpose for which the property is proposed to be taken is a public use in fact, the property will not be taken, even though directed by the legislature.

In this case, the court considered and disposed of the question whether "Forest Park" is a public use or not upon the face of the act, and held rightly, as we contend, that it is not. We can conceive of no reason that should demand a public park for St. Louis county.

A park is a public use only for a municipality, for a centre of dense population, where the population has become so dense that it requires, for its well being and protection, that it shall have appliances and institutions conferred only by municipal form of government.

The mere fact that a thing is a public use for a city, does not necessarily show that it is so where the population is not so dense that it has been found necessary to have municipal institutions.

Besides the general objection, that in no case can the creation of a park for an agricultural community be a public use, is the objection to this act in particular that it was not enacted to serve a public use, but is under the guise of creating a park for the county, attempting to give to the city of St. Louis that which would be a public use to it, at the expense of the taxpayers of the county.

This is shown by the fact that it is not where it would be easily accessible to the inhabitants of the county, but it is near the eastern verge of the county.

The court is authorized to take testimony and ascertain from all the facts, whether there is any public use in the case. (Harmony vs. Mitchel, 13 How., 115; Osborn vs. Hart, 24 Wis., 89; East St. Louis vs. St. John, 47 Ill., 463; Dingley vs. Boston, 100 Mass., 544; Anders vs. Tuberville, 6 Cold. [Tenn.], 150; Lecant vs. Police Jury, 20 La., 308; Memphis Ft. Co. vs. Memphis, 4 Cold. [Tenn.], 419; Carter vs. Tidewater Co., 3 Green, [N. J.] 54; Olmsted vs. Camp, 33 Conn., 532; Concord R. R. vs. Greely, 17 N. H., 47; Horton vs. Squankum, 8 Am. L. Reg., 179; Scudder vs. Trenton Falls, 1 Saxton, 727; Lexington vs. Applegate, 8 Dana, 289.)

II. The right of eminent domain originates in public necessity and is limited by it. (2 Dill. Munic. Corp., 555; Fowler's Case, 53 N. Y., 60; Tyler vs. Beecher, 44 Vt., 650.)

In the late case, "In Matter of Wash. Av.," (69 Pa. St., 352,) the court appointed a commission to take testimony as to the use.

This Forest Park cannot be set up by a tax upon the county for the benefit of the city. (Cheaney vs. Hooser, 19 B. Mon., 330, 349; Mathews vs. Shields; 2 Met. [Ky.], 553; Arbequest vs. Louisville, 2 Bush. [Ky.], 271; Smith vs. Newport, 7 Bush. [Ky.], 37; Longworthy vs. Dubnque, 16 Ia., 271; Fulton vs. Davenport, 17 Ia., 407; Mitchel vs. Davenport, 34 Ia., 194; Butler vs. Muscatine, 11 Ia., 433; Dieman vs. Fort Madison, 30 Ia., 541; 2 Dill. Munic. Cor. § 633; Bradshaw vs. Omaha, 1 Neb. 16.)

III. The act is unconstitutional, because it is in violation of section 14, article 11, of the constitution.

The 14th section of the 11th article of the constitution provides, that "the general assembly shall not authorize any county, city or town to become a stockholder in, or to loan its credit to any company, association or corporation, unless two thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto."

But it will be seen by reference to the words of the provision that it includes as well associations and companies as corporations. If the act creates substantially an association or company, and the county of St. Louis has no control or power over it, then the county of St. Louis is just as much excluded from loaning its credit by the issue of its bonds as if there had been a corporation created by the act.

That the board created by the act is no agency of the county of St. Louis is evident, when we consider that it does not appoint the board of commissioners.

"The language of the section makes no discrimination of the sort, nor does the main purpose of the prohibition require any such discrimination. What was the object of the restriction on county courts, city and town municipalities? The object was, plainly, to prevent them from taxing the people without their consent. No loan of credit was allowed to any

company, association or corporation, without consent of the people who had to pay it. The business of the company, association or corporation, is not referred to in the constitution. Whether educational, benevolent, individual or otherwise, whether public or private, the object is not considered. It is manifestly the intent of the constitution to prevent taxation without the assent of the tax-payers, and without regard to the purposes of the proposed tax." (State vs. Curators, etc., 57 Mo., 178.)

IV. The act is unconstitutional in this that it is an arbitrary interference with the rights of St. Louis county, and the people thereof, as declared and guaranteed by the constitution of the State.

When we come to examine what the act is, we find that the act does not simply authorize the County Court to establish the park, does not simply authorize it to contract in that behalf if it sees fit, and impose a tax upon itself if it chooses, leaving said County Court, county and people thereof free to act according to their own will and wants in the matter; but it assumes to establish the park without reference to the will or wishes of said county or people, or their local authorities, and compels the County Court to enter into contracts without its consent, and imposes upon the county an immense debt against its will, to be continually increased for years to come in the same manner. (The People, *ex rel.* Commissioners of Lincoln Park vs. The City of Chicago, 51 Ill., 17, 31, 32, 33; Hampshire vs. Franklin, 16 Mass., 87; Cheancy vs. Hooser, 9 B. Mon., 338; Opinion of Judges, 4 N. H., 570; Williamson vs. Leland, 6 Peters, 627.)

V. As to the operation of said act upon individual rights affected by it, in obtaining the land necessary for the park, the act is unconstitutional and is based upon setting in motion unconstitutional means to that end.

The act gives no power to take such lands at their value, but only at the amount of the appraisement, to be made in the manner described in section 2 of the act, and section 2 expressly requires the appraisers, when they fix the value of said land, to be guided by the assessment of 1873.

The assessment of 1873, was not made for the purposes of said act, and is no evidence of the value of any of said lands since that date. The act contains no provision for assessing the lands at their real value, and contains no provision which will permit the owners to agree on the value of the lands. By its terms no purchase can be made before an appraisement; no purchase can be made by virtue of said act at a higher sum than the amount fixed by the appraisement; no appraisement can be made at any other figure than the assessment of 1873. But this mode of fixing the value being unconstitutional, no other mode can be employed. (*Lindell's Adm'r vs. Han. & St. Jo. R. R. Co.*, 36 Mo., 543; *Soulard vs. City of St. Louis*, 36 Mo., 540; *Leary vs. Han. & St. Jo. R. R.*, 38 Mo., 485.)

There is no doubt that if the same act contains independent provisions, one of which is consistent and the other inconsistent with the organic law, one of them may stand though the other falls. Not so when the provisions are inter-dependent, and the one is the inducement, and as it were the condition of the other; and such is the case here. Here is an attempt, as we say, to do a thing in an illegal way. No provision is made for doing the thing in a legal way. It was no part of the scheme, that it should be done at all, except in the illegal way prescribed. To do it in a manner different from that indicated in the act, would be not to fulfill but defeat the legislative intention. Now, it has been often decided that if a legislative act provides for the doing of a thing only in a mode forbidden by the organic law, the whole act falls to the ground, because there is no room for the inference that the employment of other means had received the legislative approval. (*Cooley Const. Lim.*, pp. 178, 179, 180; *State vs. Com'rs of Perry Co.*, 5 Ohio, [N. S.], 507; *Slawson vs. Racine*, 13 Wis., 398; *Warren vs. Mayor, &c., of Charlestown*, 2 Gray, 99.)

VI. The act is unconstitutional in this. The title to the proposed park lands is to be made neither to a corporation nor any recognized legal political body or trustee for either.

The act says the title to the land shall "vest forever in the people of the county of St. Louis;" and by the first section, the park is "established for the people of the county of St. Louis."

It is not intended to vest in the "county of St. Louis," because if it did and it was found that the park was double the size required, and that the cost of improving that vast area was creating great dissatisfaction, the legislature might be appealed to to allow a sale of a portion of it. Therefore, to prevent this result, this device was resorted to. That such a sale could be made, see the *Brooklyn Park Com. vs. Armstrong*, 45 N. Y., 234, as to Prospect Park.

WAGNER, Judge, delivered the opinion of the court.

This case comes before us on an appeal from a judgment of the Circuit Court of St. Louis County, and the questions presented involve the constitutionality of the act of the legislature establishing Forest Park, approved March 25, 1874.

By the first section of the act a public park is established for the people of the county of St. Louis, to be called Forest Park, and its limits are designated and described. The County Court of the county is then authorized to purchase or condemn all the lands embraced within the defined boundaries for the purposes of the park, and there is a provision that before any purchase by the County Court of the property for the park, an appraisement of the property shall be made by three appraisers in the manner described in section two, and the County Court is forbidden to pay a larger sum for the property than the amount of the appraisement.

Section two provides that the County Court, by its presiding judge, shall file in the Circuit Court a petition setting forth the property, or any interest therein, sought to be condemned, the names of the owners thereof, and any matter deemed advisable or required by the Circuit Court. The Circuit Court is thereupon required to issue notice to the owners, or, if non-residents, bring them in by publication. This section then continues:

"If the defendants be found to be the owners of or otherwise interested in the property, the court shall, unless the parties agree upon appraisers, within twenty days, appoint three disinterested men to view and appraise the property sought to be condemned, or if either party requires it, a special jury of six shall be summoned to fix the value of the same. If any appraiser or appraisers refuse or fail to attend or act, the court may appoint another. The appraisers or jury shall hear testimony under oath, and return their report into court within ten days after they are qualified to act. Their report shall be under oath, and a concurrence of a majority of them fixing the value of the property, shall be sufficient. It shall state the value, in cash, of the property, or of the interest or estate therein sought to be condemned, and any other fact the court may require. Either party may except to the report, in writing, filed in the Circuit Court, within ten days after it is filed, and not thereafter. All such exceptions shall be determined by the court in a summary manner. If there be no exceptions, or the same be overruled, the court shall confirm the report, and give judgment accordingly. Each of said appraisers, or of said jury, shall have been a resident of said county for the five years next before his appointment, and an owner in fee of real estate in said county, and not interested in any of the lands of the park, or adjoining thereto; provided, in all cases, the assessment of the county assessor for the year 1873 shall be taken as a guide in fixing the value of property to be condemned or appraised."

By section three it is provided that whenever the County Court shall pay the amount so found to the party entitled to it, or pay it into the Circuit Court, the Circuit Court shall immediately order and decree that the title in fee to the property, and every other interest therein, be divested out of such owner and other persons interested, and vest forever in the people of the county.

The fourth section gives the County Court authority to issue the bonds of the county to an amount not exceeding the sum of \$1,300,000, and to apply the same to the purchase of

any lands included in Forest Park, or to sell the bonds to such an amount as may be required for the payment of the property purchased or condemned, and to apply the balance, if any, to the improvement of the park.

The fifth section provides that for the payment of the bonds and the improvement of the park, the County Court shall increase the per centum of the county taxes one-half mill on the dollar; and the sixth section makes the county treasurer the custodian of all moneys arising from the sale of the bonds or from the tax.

The seventh section then organizes a board of commissioners as follows: Three to be appointed by the County Court of St. Louis County and confirmed by the Circuit Court in general term, and three to be appointed by the mayor of the city of St. Louis, and confirmed by the city council of the city. The commissioners thus appointed constitute the board of Forest Park commissioners, and the presiding justice of the County Court is made *ex officio* a member of the board. The commissioners have power to lay off, improve, adorn, and generally govern, manage and control the use of the park, and the avenue surrounding the same, and to appoint officers and agents, prescribe their powers and duties, and make rules and regulations therefor.

In accordance with the above act the plaintiff presented its petition to the Circuit Court against the defendants, praying for a condemnation and an appropriation of their lands. In that court a motion was made to quash the summons and dismiss the proceedings, because the court had no authority or power to proceed in the cause or make the orders prayed for by the petitioner.

The reasons assigned for the motion were that the act of the legislature, under which the proceedings were instituted, was unconstitutional; that the act was void for uncertainty and vagueness, and that the act was inoperative, inasmuch as there were no such legal person or political entity as the "people of the county of St. Louis," and no conveyance could be made to them. The court sustained the motion and

quashed the summons, and dismissed the cause. To this ruling an exception was duly taken and the cause was appealed to this court.

It will be perceived that the only question in the case, is, whether the act is constitutional. Upon principle and authority the rule is settled, that acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the constitution that they can be declared void. For that reason, wherever there is a doubt it is to be construed in favor of the validity of the enactment. (*State vs. C. G. and St. Line. R. R.*, 48 Mo., 468.) That the law is unjust or impolitic or oppressive, will not authorize a court to declare it illegal, unless it violates some specific provision of the constitution. This subject was thoroughly discussed by Mr. Justice Gamble, in *Hamilton vs. St. Louis County Court*, (15 Mo., 3) where, in conformity with all the authorities, he stated the true doctrine, that no court was authorized to declare an act of the legislature void, without being able to point out some specific clause of the Constitution to which it was repugnant. A law may be unjust in its operation, or even in the principles upon which it was founded; but that would not justify a court in expanding the prohibitions in the Constitution beyond their natural and original meaning, in order to remedy an evil in any particular case. These principles have now become axiomatic, and cannot be departed from.

It is contended, that in the present case the right of eminent domain could not prevail, because the park is clearly not for a public use; that a park is a public use only for a municipality or a centre of a dense population, but that it is not demanded for the people of a county, and that here it is situated near one side of the county, and therefore could not be beneficial or useful to the people of the more remote parts. It is true that the park is located in the eastern division of the county, in the vicinity of the city of St. Louis, and its establishment will be a great source of benefit to the inhabit-

ants of the city. But it must be borne in mind that although the city of St. Louis is a distinct municipality, it is, nevertheless, a part of the county. It comprises the greater proportion of the population of the county, and pays the greater part of the county taxes. The court house is situated in the city, but it was built by taxation from the city and county alike, and is for the use and benefit of all, notwithstanding it is a county building. The park may be outside of the city limits and may be very advantageous to its citizens, but it may still redound to the interests of other portions of the county; therefore, they all have an interest and derive a use from it; their united means construct and adorn it, and it is the county, including all its population, that is the real proprietor.

When it is once seen that the land which is sought to be appropriated under the power of eminent domain is for a public use, then the legislative authority over the subject cannot be restricted or supervised by the courts; when it is plainly perceived that there is an attempt to evade the law and procure the condemnation of property for a private use, or to accomplish an end which is not public in its character, then the courts will unhesitatingly declare the act void. Or if it was doubtful or questionable whether the use was public or not, testimony might be admissible to determine the fact. But where it is plainly taken for a public use, the necessity of the exercise of the power rests with the State. The legislature is the proper body to determine the necessity of the exercise of the power and the extent to which the exercise of it shall be carried, and there is no restraint upon the power, save that requiring that compensation shall be made. (*The People vs. Smith*, 21 N. Y., 597; *The Brooklyn Park Co. vs. Armstrong*, 45 N. Y., 234.)

This is the established doctrine on the subject. In the case of *Dingley vs. City of Boston*, (100 Mass., 544) a case relied on by the respondents, a statute was passed to enable the city to abate a nuisance, and for the preservation of the public health. It authorized the city to purchase, or other-

wise take the lands within a large district; provided for payment to the owners of damages for the taking, and directed the city to raise the grade of the territory so taken or purchased with reference to a complete drainage thereof, so as to abate the nuisance and preserve the health of the city. It was insisted that the law was unconstitutional, as being the exercise of a judicial power, and as authorizing the taking of a greater interest in the land than was necessary. But the court ruled against both these positions, and sustained the validity of the law. It was declared that when land and other property was taken by the legislature, for the purpose of a public use, the legislature determined what property should be taken, and they might properly refer to the judiciary the duty of appointing commissioners as officers of the court to hear the parties interested, and apportion among them the expense of the proceeding and of rendering judgment on the report of the commissioners, and issuing process to enforce their judgment.

In *Varick vs. Smith*, (5 Paige, 137) it is said that the legislature is the sole judge as to the expediency of making police regulations interfering with the natural rights of citizens, which are not prohibited by the constitution, and also as to the expediency of exercising the right of eminent domain for the purpose of making public improvements, either for the benefit of the inhabitants of the State, or any particular part thereof.

The case of *Scudder vs. The Trenton, Delaware Falls Co.*, (1 Saxt., 694) contains a very learned and thorough discussion of this question. There a bill was filed to procure an injunction to restrain the defendants from entering upon the property of the complainant, for the purpose of cutting and constructing a raceway, to conduct water from the river Delaware to a point below Trenton Falls. The right to cut and construct the raceway was claimed by the company by virtue of an act of the General Assembly of the State, entitled, "An act to incorporate a company to create a water power at the city of Trenton and its vicinity, and for other purposes." It

seems that the company was incorporated for manufacturing purposes, and their charter gave them the right to condemn and appropriate property for their use. The Chancellor, after examining the whole doctrine applicable to the right of the exercise of the power of eminent domain, remarks: "Before I undertake to express an opinion, it will be well to see that I am in the line of duty, for it is contended on the part of the defendants, that the power of judging on this subject is committed to the legislative department of the government alone, and that the judiciary cannot interfere. This doctrine the court can in no wise admit; the legislature in this State is not omnipotent, as was the British Parliament; it is subordinate to the constitution, and if it transcends its power, its acts are void, and it is the duty of the judiciary to declare them so. The duty is at all times unpleasant, but no independent tribunal will hesitate to do it in clear cases. The opinion of Chancellor Kent, in his Commentaries, (2 Kent, 276) does not support the position of the learned counsel. The author remarks that it undoubtedly must rest in the wisdom of the legislature to determine when public use requires the assumption of private property. I do not understand by this that the legislature is to be the sole judge of what is meant by public use; but that the fact being established that private property of a particular character may be taken and appropriated to public purposes, it is for the wisdom of the legislature to say when that appropriation shall be made. That the commentator did not intend to be understood as saying that the legislature was intended to be sole judge in this case is evident; for he admits afterwards that, if the legislature should take the property of A. and give it to B., the law would be unconstitutional and void; and yet, who is to judge that the property thus taken from one and given to another was not intended by the legislature for public use and benefit? Who is to declare it unconstitutional and void after they have determined its propriety. Not doubting that the court may safely sit in judgment on this matter, it only remains to inquire whether the use to which the property is to

be appropriated is a public use. * * * May we not, in considering what shall be a public use and benefit look at the objects, the purposes, and the results of the undertaking? The water power about to be created will be sufficient for the erection of seventy mills and factories, and other works dependent on such power. It will be located at the seat of government, at the head of tide water, and in a flourishing and populous district of country. * * * Looking at this case in all its bearings, and believing, as I do, that great benefit will result to the community from the contemplated improvement, I am not satisfied to declare the act of incorporation, or that part of it which is now in question, void and unconstitutional. I do not see in it such a decided and palpable violation of the constitutional right as will warrant me to put an end to this work by the strong arm of the court.

The legislature have thought proper, in their wisdom, to exercise the right of eminent domain, for an object, which they deem of public use and importance, and, although their judgment is not conclusive as to the right, it is certainly entitled to a most respectful consideration." And the court held that the act was constitutional.

This case certainly goes far enough in upholding the right to appropriate property, and I have abstracted liberally from it because it is one of the principal cases relied on by the respondents. It is in precise accordance with the doctrine previously laid down in this opinion, that the court will determine whether the use is public, but when an affirmative to this question is reached, then the judicial function is gone, and there is no restraint upon the legislative discretion.

Many other authorities have been examined, but it is unnecessary to make special reference to them, as they sustain throughout the views above announced. Private property is taken for public use when it is appropriated for the common use of the public at large. A stronger instance cannot be given than that of property converted into a public park. A public park becomes the property of the pub-

lie at large, and is under the control of the public authorities; it may well be paid for by the public, as it is intended for public use. There is sufficient, then, on the face of this act to warrant us in holding that the park in question is for public use.

It is next objected, that the act is void because it violates section 14 of art. XI of the constitution. That section provides that "the General Assembly shall not authorize any county, city, or town to become a stockholder in, or to loan its credit to any company, association or corporation unless two-thirds of the qualified voters of such county, city or town, at a regular or special election to be held therein, shall assent thereto." To sustain this objection, the case of the State vs. The Curators of the State University, decided by this court at its last July term, is cited, (57 Mo., 178). The facts were these: That Phelps County undertook to issue its bonds and deliver them to a corporation established for a public educational purpose for the State, in order to obtain the location of a school of mines, without having first obtained the consent of the people of the county. This the court held the county could not do, and Judge Napton, who delivered the opinion, said: "What was the object of the restriction on the County Courts, city and town municipalities? The object was, plainly, to prevent them from taxing the people without their consent. No loan of credit was allowed to any company, association, or corporation without the consent of the people who had to pay it. The business of the company, association or corporation is not referred to in the constitution. Whether educational, benevolent, individual or otherwise, whether public or private, the object is not considered."

But the two cases are wholly different. They are neither parallel nor analogous. Phelps County was not authorized to establish a school of mines for the use of its own people, to own and manage it through commissioners appointed for that purpose. It was simply empowered to issue its bonds, or loan its credit, to the State University, a corporation entirely

foreign to its limits, and managed by trustees who were not appointed by it. The county got no property in exchange for its bonds, and had no voice in their negotiation, nor could it exercise any control over the proceeds after they were sold. In the present case there is no loaning of credit, or taking stock in any company, association, or corporation. A county debt is created for property conveyed to the county, and the taxation is imposed to pay off and discharge that debt. Nor do we consider it objectionable that the control and management of the park is committed to a board of commissioners, instead of the County Court. The twenty-third section of the sixth article of the constitution provides, that inferior tribunals, to be known as County Courts, shall be established in each county for the transaction of all county business, but that will not preclude the State from appointing other agencies in certain cases. Three of the commissioners are appointed by the County Court, the presiding judge of that court makes the fourth, and the three others are appointed by the City Council. Thus they all derive their powers, either directly or remotely, from the voters of the county. In principle, the board does not differ from the police board or the board of water commissioners, and it has been decided that the legislature had the undoubted constitutional right to establish these boards as a part of the local administration of municipal affairs. They are regarded as mere administrative officers or agencies for the performance of certain duties, and as such the establishment of their powers and their appointment have been held valid. (*State vs. Valle*, 41 Mo., 29; *State vs. St. Louis County Court*, 34 Mo., 546; *People vs. Draper*, 15 N. Y., 532; *Daily vs. City of St. Paul*, 7 Minn., 390.) The further point is insisted upon that the act gives no power to take lands at their value, but only at the amount of the appraisement, to be made in the manner described in section 2, and that that section expressly requires the appraisers, in fixing the value of the land, to be guided by the assessment of 1873. I do not think that the section will bear the construction that is thus attempted to be placed upon it.

The language is: "Provided, in all cases, the assessment of the county assessor for the year 1873 shall be taken as a guide in fixing the value of the property to be condemned or appraised." I am inclined to the opinion that what the framer of the section intended was that the different pieces of property appropriated should be adjusted according to the relative value placed upon them by the assessor in that year. If it was designed that the assessment made in 1873 was to be taken as the measure or standard in fixing the value for compensation, then unquestionably this part of the section is void. Property can only be taken or appropriated upon making just compensation. What is just is a matter of inquiry, ascertainable by either appraisers or a jury upon evidence furnished in the case. No law can arbitrarily fix a value on property and tell the owner that he shall take that. That would be assuming a prerogative utterly unwarranted and would be destructive of the rights of property. But does it follow that because this part of the section is unconstitutional the whole act is invalid? By no means. Nothing is better settled than that an act may be good in part and bad in part.

Where a clause in an act is rendered invalid on account of some constitutional prohibition, that will be stricken out or disregarded, but the other parts that are not liable to any such objection will remain good and the act will be enforced, provided enough is left to put it in operation and carry out the object had in view in its enactment. The second section provides that "the court shall, unless the parties themselves agree upon appraisers within twenty days, appoint three disinterested men to view and appraise the property sought to be condemned, or if either party requires it, a special jury of six shall be summoned to fix the value of the same. * * *

The appraisers or jury shall hear testimony under oath and return their report into court within ten days after they are qualified to act. Their report shall be under oath, and the concurrence of a majority of them, fixing the value of the property, shall be sufficient. It shall state the value, in cash,

of the property, or of the interest or estate therein sought to be condemned, and any other fact the court may require. Either party may except to the report, in writing, filed in the Circuit Court, within ten days after it is filed, and not thereafter."

This section is complete without the obnoxious clause. It furnishes the necessary and appropriate method for determining the value. It provides for appraisers or a jury, at the election of either party, whose duty it is to hear testimony and arrive at the actual cash value, which will furnish the criterion for just compensation. The objectionable proviso, therefore, may be entirely eliminated and the act will be good and capable of enforcement.

The last point to be examined is that the act is unconstitutional, because the grant of the proposed park land is to be made neither to a corporation nor to any recognized legal political body, nor to a trustee for either; that there is no such legal body or political entity as the people of St. Louis County. Aside from the well known doctrine that a trust never fails for the want of a trustee, that to prevent a failure a court of equity will interpose and appoint one, we do not think there is any merit in the objection. In an early day nearly all the grants of commons made to our towns were made to the inhabitants of the towns, and yet it has always been held that these commons were the property of the towns. In *Patten vs. Chapin*, (6 Paige, 649) the inhabitants of an incorporated neighborhood collected a fund and with it built a school house for their use, and it was decided that upon the incorporation of the neighborhood into a village, the title to the school house vested in the corporation. The case of the *Trustees of Greene Township vs. Campbell*, (16 Ohio St., 11) was where lands had been conveyed and vested in the legislature of the State, and the court held that it was the same, in legal effect, as if the title had been vested in the State *eo nomine*. To the same effect is *Corder vs. Commissioners of Fayette County* (*Id.*, 353). There the devise was made to the county by name, when the law required that it should be

Hopkins, to use, v. Sievert, et al.

made to the commissioners of the county. But the court said: "A devise to the county is a devise to the commissioners of the county, and vests the title in them for the uses of the county. The county and the commissioners of the county are often convertible terms." We therefore think it was immaterial whether the law provided that the title should be vested in the county or in the people of the county. They may be regarded as interchangeable or convertible terms. After a careful and attentive consideration of all the questions that have been presented and argued in this case, we have been unable to find in the act such an infringement of any specific provision of the constitution of this State as would authorize us to declare it void.

Wherefore the judgment below should be reversed and the cause remanded; all the judges concurring.

—○—

SAMUEL W. HOPKINS, to use of KING L. WILLIAMS, Appellant,
vs. FREDERICK SIEVERT, *et al.*, Respondents.

1. *Evidence—Fraud—Intent.*—Very slight circumstances, apparently trivial and unimportant in themselves, when combined together, may afford irrefragable proof of fraudulent intent.

Appeal from St. Charles Circuit Court.

F. F. Williams, for Appellant.

Nat. C. Dryden, for Respondents.

SHERWOOD, Judge, delivered the opinion of the court.

This was a suit brought on a bond given by defendant and his sureties, to indemnify the sheriff who levied an execution on and sold certain saloon property, liquors and fixtures as the property of one Early.

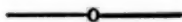
The answer denied that King L. Williams, to whose use this suit was brought, had in reality bought the goods; but alleged that his purchase was only a pretended one, made with intent to hinder, delay and defraud the creditors of Early.

Hug, Adm'x v. Van Burkleeo.

The instructions, as well on behalf of plaintiff as on the part of defendants, were entirely unexceptionable. But it is claimed that there is no evidence whatever in support of the verdict.

In reference to this it may be replied that evidence of a fraudulent transfer or disposition of property, is rarely of a direct or positive character; and for the obvious reason, that those engaged in such questionable transactions, do not court the light of day. Very slight circumstances, therefore, may, although apparently trivial and unimportant of themselves, afford, when combined together, irrefragable proof of fraudulent intent. With this view of the subject, and after a careful consideration of the testimony, we are not prepared to say that the triers of the fact were without the necessary basis whereon to build their verdict.

The judgment is affirmed; the other judges concur.



AGNES HUG, Adm'x of CHARLES HUG, Respondent, *vs.* STEPHEN VAN BURKLEO, Appellant.

1. *Equity—Contracts—Specific Performance—Appraisement—Pleading—Account.*—A covenant in a lease that at the end of the term the value of the improvements shall be ascertained by three appraisers to be chosen as provided in the lease, cannot be specifically enforced by a court of equity. But a petition which alleges such covenant and seeks equitable relief, states a cause of action, as equity would have jurisdiction to have an account taken of the improvements.

Appeal from St. Charles Circuit Court.

Lackland and Broadhead, for Appellant.

I. The agreement to arbitrate is not such an agreement as a court of equity will ever enforce—being merely voluntary. It is an agreement revocable in its nature at any time by either party. (See 16 Johns., 205, also 1 Cow., 335; King vs. Howard, 27 Mo., 21, in which the court refers to 2 Story Eq. § 1457; 3 Story, 800; Agar vs. Macklew, 2 Sim. & Stewart, 418; 16 Abb., 205; 26 How., 599.)

Hug, Adm'x v. Van Burkleo.

Theo. Bruere, for Respondent.

I. This is not a suit specifically to enforce an arbitration. (Biddle vs. Ramsey, 52 Mo., 158; Garred vs. Macey, 10 Mo., 161; Curry vs. Lackey, 35 Mo., 389; Zallee vs. The Laclede M. & Fire Ins. Co., 44 Mo., 531.)

II. The court may grant any relief consistent with the case made by the evidence, and embraced within the issues. (Northcraft vs. Martin, 28 Mo., 469; Easley vs. Prewitt, 37 Mo., 361; Biddle vs. Ramsey, 52 Mo., 158; Henderson vs. Dickey, 50 Mo., 161.)

SHERWOOD, Judge, delivered the opinion of the court.

Where parties to a lease, by the terms of the instrument, agree that upon the surrender of the leasehold premises the value of improvements made thereon shall be ascertained by three householders, the lessor and the lessee each to select one, and those so selected to choose a third; in the event of the refusal of either to comply with such stipulation, it is out of the power of a court of equity, by the appointment of appraisers or otherwise, to specifically enforce the contract thus made. A petition, however, which seeks to obtain equitable relief based on the above stated ground, will, although it asks for specific performance of such a contract, still state a cause of action, as equity would have jurisdiction in such cases to have an account taken as to the value of improvements made. Both these points were so ruled in the case of Biddle vs. Ramsey (52 Mo., 153).

The judgment of the court below, because it attempts to specifically enforce the contract made in the present instance between the lessor and the lessee, by the appointment of three householders to appraise or ascertain the value of the improvements made on the property leased, must be reversed and the cause remanded; the other judges concur.

State v. Scanlan.

THE STATE OF MISSOURI, Respondent, *vs.* MICHAEL SCANLAN,
Appellant.

1. *Practice, Supreme Court—Witnesses—Capacity—Legal conclusions.*—The Supreme Court cannot review the finding of fact by the judge of the court below, upon personal inspection, as to the mental capacity of a witness. It may review, however, any legal conclusions declared to result from the fact of capacity or incapacity, as found.
2. *Witness—Competency—Extreme youth—Tests.*—The only test of competency in a child under ten years of age to be a witness, is whether it appears incapable of receiving just impressions of the facts, or of relating them truly.
3. *Witness—Capacity—Extreme youth—Reception of evidence.*—Where a child, called upon to testify, is manifestly embarrassed by the novelty of the surroundings, so as to give, at first, absurd or unintelligible answers, it is eminently proper for the court to wait for a recovery of the mental equilibrium, before putting further questions and deciding upon the capacity of the witness.

Appeal from St. Louis Criminal Court.

C. B. Smythe, for Appellant.

J. C. Normile, for Respondent, cited Commonwealth vs. Mullins, 2 Allen [Mass.], 296; Commonwealth vs. Hills, 10 Cush., 530; 1 Whart., § 755, [6th Ed.]; Cook vs. Mix, 11 Conn., 432; Reynolds vs. Lounsbury, 6 Hill, 53; Chouteau vs. Sarpy, 8 Mo., 733; Roscoe's Crim. Ev. [6th Ed.], 106; State vs. LeBlanc, 1 Const., 354; State vs. Whittier, 21 Me., 341; Washburn vs. The People, 10 Mich., 372; 2 Wagn. Stat., 1374, § 8.

LEWIS, Judge, delivered the opinion of the court.

The defendant was convicted of murder in the first degree, committed upon his wife, and sentenced to death. His appeal to this court brings us but one question for review. This appears in the following extract from the bill of exceptions:

"The State then offered as a witness in behalf of the prosecution, Mamie Scanlan. Upon being thus presented, the defendant objected to her being sworn and examined because of her tender years, whereupon she was examined by the judge respecting her qualifications as a witness; and upon this examination, the child, being much frightened and scarcely able to speak above her breath, stated to the judge

that she could not tell her age, that she did not know the nature or obligation of an oath, nor what would be the consequences of false swearing. The answers of the child to the questions of the judge, were invariably in monosyllables, yes or no, and uttered in a tone scarcely audible. Upon the first examination, the judge refused to have her sworn. Upon a re-examination, however, the court, from inspection of the witness, judged her to be between nine and ten years of age, and, having partially recovered from a fright occasioned by surroundings entirely new to her, the judge ascertained from her statements that she was the daughter of the defendant, that she knew her prayers, could read some, believed in God, and thought it wrong to tell lies. She further stated she was present at the time her mother was injured by the defendant. And thereupon the judge directed the witness to be sworn as a witness in the case. To which decision of the court, allowing said witness to be sworn, the defendant by his counsel, then and there, excepted."

We find here nothing which by any rule of law or practice will permit us to interfere with the verdict. The ruling of the Criminal Court embodied no proper subject for appellate revision. The capacity or incapacity of the child as a witness in certain essential particulars was a question of fact which the judge determined upon personal inspection and oral examination. If any principle of law had been declared by him—as that, although found incapable of discriminating between truth and falsehood, the law made her, nevertheless, a competent witness—that might well be brought here for review. But I can find no case in which it is held proper for an appellate court to review the finding of fact. The contrary rule is declared by all respectable authorities. No hardship necessarily results; for, if the judge should chance to err in his conclusion, the jury hold a powerful corrective in their right to pass upon the credibility of the witness, as tested on the stand by the usual appliances.

But aside from this view—with which, were not a human life involved, we might easily dismiss the subject—we cannot

discover any reason to doubt the entire propriety of the court's permitting the witness to testify.

The history of criminal procedure in this and the mother country abounds in illustrations of a judicial care which seeks to secure, on the one hand, whatever pertinent testimony may bring a guaranty of conscious moral responsibility, and, on the other, to admit none that may be offered without it. Distinctions and general rules have assumed various forms; but the spirit of all, as applied to children of tender years, appears in the simple formula of our statute. The rule (Wagn. Stat., 1374, § 8) excludes merely "a child under ten years of age who appears incapable of receiving just impressions of the facts respecting which they are examined or of relating them truly."

We can discover no token of any such incapacity in the final answers given to the judge by the witness in this case. The course pursued on the occasion was eminently proper. There is a practice sanctioned by time-honored precedent, under which when a child is found too young to testify with a proper sense of responsibility, the trial may be postponed until the witness shall have been suitably instructed. This, however, has been criticised, as like "preparing or getting up a witness for a particular purpose." In the present case, even that objection disappears. While the child was so laboring under nervous agitation from the novelty of the surroundings, as to give unintelligible or absurd answers, she was not permitted to testify. The court merely waited for a natural recovery of mental equilibrium, which should permit the true capabilities of the witness to appear. No sign was visible then in her examination, that she was incapable, either of receiving just impressions of the facts about which she was to testify, or of relating them truly. We can find no error in the record.

The judgment is affirmed; the other judges concur.

Schwarz v. Han. & St. Jos. R. R. Co.

**FRANK SCHWARZ, Respondent, vs. HANNIBAL & ST. JOSEPH
RAILROAD Co., Appellant.**

1. *Railroads—Damages—Killing of bull—Const. Stat.*—In suit against a railroad for the killing of stock, it is no defense that the animal was a bull and subject to the provisions of § 5 of the act passed for the restraint of certain animals therein named. (Wagn. Stat., p. 134.)

Appeal from Marion Circuit Court.

James Carr, for Appellant.

Anderson & Boulware, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace, to recover damages from the defendant for the killing of a bull belonging to the plaintiff, which it was charged was killed by the running of its locomotive and cars against and over said bull upon defendant's railroad, at a point on said road where the same was not fenced, and where there was no crossing of a public highway. The bull was averred to be of the value of eighty dollars, and the petition prayed judgment for double damages.

A trial was had before the justice of the peace, where the plaintiff recovered a judgment for the sum of eighty dollars. The plaintiff appealed to the Marion Circuit Court, where the case was again tried.

The evidence given upon the trial in the Circuit Court was substantially as follows: That on the 21st day of Oct. 1873, the plaintiff was the owner of the bull sued for; that the bull was worth \$75 or \$80; that the bull was killed by the locomotive or train of the defendant, at a point on defendant's road in Fabius township, in Marion County, and where the road was not fenced, and where there was no crossing of a public highway, and where the railroad runs through timbered land; that the plaintiff lived about one mile from the road and the place where the accident occurred, but that his land continued up to within forty or fifty rods of the

road; that the bull at the time he was killed, was running at large with plaintiff's other cattle; that plaintiff had a hand who herded his cattle through the day time, and that the bull was killed in the morning. The herd of cattle with which the bull was running, was close to the road at the time of the killing.

At the close of this evidence the defendant asked the court to declare the law to be, "that, admitting all of the evidence adduced by the plaintiff to be true, he has shown no cause of action, and the court will find for the defendant." The court refused to make this declaration of law, and the defendant excepted. The defendant offered no evidence.

The court then, at the instance of the plaintiff, declared the law to be as follows: "If the defendant, by the cars, locomotive or other carriages used on its railroad, struck and killed the bull of plaintiff, and if such striking and killing was done at a point on said railroad in Fabius township, in Marion county, Mo., where the same was not inclosed by a fence, and not in the crossing of a public highway, then and in that case, plaintiff is entitled to recover in this action." To the making of this declaration of law, the defendant objected and excepted. The court then rendered a judgment in favor of the plaintiff for \$83.

After an unsuccessful motion for a new trial, the defendant appealed to this court. The only ground for a reversal of the judgment in this case, urged by the defendant, is founded on the fifth section of the act of the legislature of this State, concerning certain animals running at large. (1 Wagn Stat., p. 134.) The section referred to, reads as follows: "If any bull or ram over one year old, or boar hog over three months old, shall be found going at large off the premises, or out of the enclosure or control of its owner or keeper, after three days' notice signed by three free-holders of the township, where such bull or ram or boar hog may be running at large, and the owner shall fail or neglect to take up or confine the same on or within his or her premises, it shall be lawful for any person to castrate any such bull, or ram or boar hog; provided that the same be done in a lawful manner," etc.

It is contended by the defendant, that this section of the statute makes it unlawful for the animals named to run at large, and that the plaintiff having, in violation of the statute, suffered his bull to run at large, cannot recover for any injury inflicted on the bull by the locomotive of defendant, or at least, that he cannot recover without showing that the accident was occasioned by the gross negligence of defendant, or in other words, that as the plaintiff himself was a wrong doer, he is not entitled to the benefits of the 5th section of the statute concerning damages and contributions, (Wagn. Stat., 520) which provides that, "where animals are killed by the cars or locomotives on any railroad in this State, the owner may recover the value thereof without proving negligence or unskillfulness, except in cases where the accident occurs at a public crossing of the road, or where the road is inclosed by a fence, etc."

I do not think that this position can be maintained. The statute neither directly or indirectly makes it unlawful for the animals named to run at large, until after the expiration of three days after notice shall have been given to the owner, which notice shall be signed by three free-holders of the township. Until this notice shall have been given, it is as lawful for such animals to run at large as any other cattle in the country, and even after the notice has been given, all that can be done is to castrate the animal in a careful way, so as to do him as little damage as possible. The object of the law is a plain one. It is to enable persons who may desire to breed and raise blooded stock in the country to protect their herds from contact with male cattle which may adulterate their stock or herds. When the legislature attempts to prohibit the running of any particular kind of stock at large, appropriate language is used. The first section of the same act makes a provision of that kind. It provides that, "If any stallion or any unaltered male mule or jackass over the age of two years be found running at large, the owner shall be fined, for the first offense, three dollars, and for every subsequent offense not exceeding ten dollars, to be recovered by civil

Jones v. Brewington, et al.

action, etc." In this last section the stock is prohibited from running at large by a penalty. This makes it unlawful to permit the animals of the character named to run at large; but the fifth section does not directly prohibit the running of stock at large; but recognizes the legality of the running of the stock named at large, until after the three days' notice is given, and even then if the owner fails to take his stock up, all that can be done is, that persons may protect themselves from injury by the means named in the statute, doing the animal as little damage as possible. We have been referred to several authorities by the learned counsel for the defendant, but we cannot see that they have any applicability to this case.

There having been no other error suggested or insisted on in the case, the judgment will be affirmed; the other judges concur.

—o—

WILLIAM JONES, Appellant, *vs.* ROBERT D. BREWINGTON, *et al.*,
Respondents.

1. *Mortgages—Not expressed to be sealed, good in equity—Title acquired under, defense to suit in ejectment under later deed, etc.*—An instrument in the nature of a mortgage with power of sale, not expressed to be sealed, may be good as an equitable mortgage; and a title acquired from a sale under it will be a good defense in ejectment against a deed of later date, which was not filed for record until long after the transfer under the mortgage, accompanied by change of possession.

Appeal from Adair Circuit Court.

Harrington & Cover, for Appellant.

I. It must appear in the body of the deed that it is a sealed instrument, and a scroll must be attached to the same by way of a seal. Without these essentials the deed is not a sealed instrument within the meaning of the statutes. (Wagn. Stat., 269, § 5, note 3; Grimsley vs. Riley's Adm'r, 5 Mo., 280, [in point]; State *ex rel.* West vs. Thompson, 49 Mo.,

188; Walker vs. Kiele, 8 Mo., 301; Glasscock vs. Glasscock, 8 Mo., 577; Underwood vs. Dollins, 47 Mo., 259; Groner vs. Smith, 49 Mo., 318.)

II. A sale of land under an instrument given to secure the payment of a debt, conveys no title. (Linton vs. Boly, 12 Mo., 567.)

H. F. Miller with Ellison & Ellison, for Respondents.

I. At common law it is not necessary that an instrument be expressed on its face to be sealed, if it was in fact sealed. (4 Kent, 453; Proprietors Mill Dam Foundry vs. Hovey, 21 Pick., 417; Clark vs. Rynex, 53 Mo., 380.)

II Although the instrument is not sealed, it is still good as an equitable mortgage. (McClurg vs. Phillips, 49 Mo., 315.) And the transfers thereunder convey to defendant an equity which will defeat plaintiff's action of ejectment. And the record was notice to the world. (1 Wagn. Stat., 277, §§ 24, 25.)

LEWIS, Judge, delivered the opinion of the court.

This was an action of ejectment. Both parties claimed under Isaac D. Jones, who owned the land in 1857. Plaintiff exhibited a conveyance from Jones to himself, dated May 15, 1858, and filed for record July 21, 1871.

Defendant's answer set up, by way of equitable defense, that on June 30th, 1857, an instrument of writing was executed by Isaac D. Jones to Wm. M. Lyda, in intended fulfillment of a prior agreement whereby Jones was to convey the land to Lyda, by mortgage or deed of trust, to secure the grantee and other parties upon a large amount of indebtedness; that said instrument was accepted and understood by the parties as being "good, valid and effectual," for the purposes so intended, and certain transfers of notes, accounts, etc., were made on the strength of it, in accordance with the agreement; that Lyda, as trustee, under the powers conferred by the instrument, sold the land on the 25th October, 1858, when the purchaser went into possession; and that defendants have since acquired title and possession from him.

Jones v. Brewington, et al.

The writing executed by Jones to Lyda was filed for record August 11, 1857. Defendants offered a certified copy from the record, to which the plaintiff at first objected, demanding the original, but afterwards withdrew his objection, and consented to the introduction of the copy. It commenced with the words: "This deed made and entered into, etc.," and ended thus: "In witness whereof we have hereto subscribed our names, this the 30th day of June, A. D. 1857.

ISAAC D. JONES, [SEAL.]

R. E. JONES, [SEAL.]

WM. M. LYDA. [SEAL.]"

Plaintiff raised the objection that the instrument did not appear to be sealed, and was not a deed. The court overruled his objection, and herein is presented the principal question to which our attention is directed.

The respondents insist, that though no seal is mentioned in the body of the instrument, yet for aught that appears to the contrary, there was a common law seal affixed to the original; and that the recorder, not being able to transfer that to the copy, could only indicate its presence by the word "seal," written within a scrawl; that the plaintiff, by waiving the production of the original, dispensed with the necessity of proving that there was a seal on it, and all the presumptions were therefore against him, and in favor of the existence of a seal to each signature as indicated by the recorder.

In the opinion delivered in *Dale vs. Wright*, (57 Mo., 110.) these views would appear to have been sanctioned by this court. But whether a correct interpretation would so sustain them or not, it is sufficient for the purposes of this case to look into the effect of the instrument, either as sealed or unsealed. Thus considered, it was at least competent to create an equitable mortgage lien. (*McClurg vs. Phillips*, 49 Mo., 315.) It was duly recorded, and thus was notice of its purposes imparted to the world. Within the same year those purposes were executed by a sale in conformity with the prescribed conditions, and a deed made to the purchaser. The tes-

Lippold v. Held.

timony, though not conclusive, tended to show that possession was taken soon afterwards under this sale, and was held by one of the defendants, as the last grantee under that authority, at the commencement of this suit.

If such an instrument, unsealed, would be enforced as a mortgage lien, by a court of equity, against the objections of the grantor—as is unquestionably true—surely an execution and consummation of its purposes, thus acquiesced in for more than ten years, should require nothing more to make it a substantial defense against a deed executed one year later, and not put upon record until thirteen years after that. Thus viewing the instrument, we find no error in its admission by the court as testimony, or in the instruction given to the jury, which permitted them to treat it as a substantial element in the defense. This disposes of the only point made here by the appellant, and so the judgment must be affirmed; the other judges concur.

—O—

MATHIAS LIPPOLD, Defendant in Error, vs. JOHN HELD, Plaintiff in Error.

1. *Security, verbal release of—Proof as to intention.*—Proof of intention to give a verbal release of a written security, to avail, must be clear and satisfactory.
2. *Mortgage—Taking of new note, effect of as to release.*—Where a note is secured by a mortgage, the taking of a new note does not of itself operate as a discharge of the lien. Nothing short of an actual payment of the debt itself, or an express release, will have that effect.

Error to Warren Circuit Court.

Theo. Bruere, for Plaintiff in Error.

I. Defendant in error, himself, at the time he returned the original note to plaintiff in error, wrote on the back of it, "this note is void," thus showing that by the new note he intended that the \$2,000 was considered paid. There could be no substitution for a paid note.

Dryden & Dryden and L. J. Dryden, for Defendant in Error.

I. The taking of a new note, and the surrender and giving up of the old one, did not *per se* operate as a discharge of the lien of the deed of trust. The new note did not operate as a payment and extinguishment of the original debt, unless such was the clear intention of the parties. (*Thornton vs. Irwin*, 43 Mo., 162; *McDonald vs. Hulse* 16 Mo., 503; *Hilliard Mort.*, ch. 17, § 4 and notes; *McCormick vs. Digby*, 8 Blackf., 99; *Pomeroy vs. Rice*, 16 Pick., 22.)

WAGNER, Judge, delivered the opinion of the court.

From the record it appears, that on the 7th of June, 1868, the defendant made to the plaintiff his note of that date for \$2,000, payable twelve months after date, with interest at six per cent. per annum. To secure the payment of the note, defendant and his wife executed a deed of trust, by which they conveyed certain lands to Mathias Gerster, in trust, conditioned that if the sum of money specified in the note, with interest, should be paid, when due, then the deed should be void, otherwise Gerster should proceed to sell the land, and out of the proceeds pay whatever remained due on the note.

Afterwards, about the 7th of July, 1872, defendant sold part of the land to Mathias and Henry Gerster, and by his direction the Gersters paid the purchase price of the land so bought by them to the plaintiff, who received the same, and consented that as to the part of the land bought by them, the lien should be released; and the purchase price so paid was applied on the \$2,000 note. After such application there remained a balance due and unpaid upon the note of \$960, for which defendant gave plaintiff a new note of that amount, payable to his order one day after date, with interest at the rate of ten per cent. per annum. Defendant at the same time took up the old note. The parties at the same time had a settlement, in which it was found that defendant owed plaintiff on account in the sum of \$73.70, for which he gave another and distinct note of that amount.

The above facts were set forth in the plaintiff's petition, and it was charged that the new note of \$960 was a part of the original debt of \$2,000, having been simply substituted for the amount remaining unpaid on the old note, and that it was the intention of all parties, when the \$960 note was so substituted, that it should be and remain secured by said deed of trust upon that part of the land, which had not been already sold to the Gersters; and, as the same was due and unpaid, prayed that it might be declared a lien upon the land so unsold, and that it might be sold to satisfy the note and interest.

To this petition defendant answered, admitting the principal facts stated in the petition, but he claimed that the new note for \$960 was not given in substitution of the balance on the first note, but in payment and satisfaction thereof, and that it was agreed between him and plaintiff, when plaintiff gave up the \$2,000 note to him, that he thereby relinquished his lien under the deed of trust for such balance on all of the land.

Evidence for both parties was heard by the court, and a decree rendered substantially as prayed for in the petition.

The plaintiff testified that in the taking of the new note of \$960, it was not intended to release the lien of the deed of trust, but only to have more interest for the balance, then long past due, of which he had been deprived of the use, and that in consequence thereof he had to borrow money at ten per cent., and that defendant agreed to pay the higher rate of interest for forbearance of suit on the note. He further testified that no release was spoken of at the time the new note was given, and none actually made, but that on the contrary it was agreed and understood that the part of the land unsold should remain security for the new note. Other witnesses for the plaintiff tended to corroborate his testimony.

Defendant in his own behalf testified that he had a settlement with plaintiff, at plaintiff's request, both of the note and interest, and certain store and blacksmith accounts; that a balance of \$960 due on the \$2,000 note was found; and a

balance of \$73.70 on other accounts was found, and that for these he executed to plaintiff his two notes, one for \$960 and the other for 73.70, each bearing interest at the rate of ten per cent.; that plaintiff at the time of the settlement said that the deed of trust was to be released, and that he (defendant) would not have given the new note at the higher rate of interest, if such had not been the understanding. He further testified that Henry Gerster was present at the time of the settlement and making of the new note, and heard what passed between the parties. Gerster was sworn as a witness for the defendant, and testified that he was present when defendant gave the new note, but did not hear the plaintiff say that he would release the deed of trust.

Upon the finding of the facts, we entirely concur with the result arrived at by the court. To show that a verbal release was intended, of an existing security, the intention to release should be manifested by clear and satisfactory evidence.

In the present case the evidence strongly preponderates the other way. The plaintiff swears directly and positively that he had no intention, and that there was no agreement to release his security on the land remaining unsold, and in this he is sustained by several witnesses whose testimony has an important bearing on the question. The defendant alone swore to the contrary, and the only witness that he introduced to sustain him wholly failed to do so. Taking these circumstances together, and the weight which we feel bound to attach to the finding of the court, and it is evident that we are not at liberty to interfere with the decree on that account.

The next question is, did the taking of the new note, irrespective of any intention between the parties, operate as a payment of the first note and produce an extinguishment of the lien? A mortgage being given as security for a debt, and not merely for any particular evidence of debt, the general rule is, that no mere change in the mode and time of payment, nothing short of actual payment of the debt, or an express release, will operate as a discharge of the mortgage.

The lien lasts as long as the debt, and by the terms of the contract nothing but payment avoids it. (1 Hill. Mort., 4th Ed., p. 476, §§ 3, 4, and notes; Thornton vs. Irwin, 43 Mo., 153.)

The very point arising in this case was decided in *McDonald vs. Hulse*, (16 Mo., 503). There A. gave B. a bond bearing six per cent. interest, secured by a deed of trust on a slave. Afterwards, without intending to abandon his lien on the slave, B. took from A. a new bond, bearing ten per cent. interest, and then gave up the old bond. It was held, that by this act B. did not lose his lien on the slave, but that the slave was only subject to a lien for the amount of the old bond, with six per cent. interest. After deciding that taking the new note did not extinguish the lien, the court said, in reference to the interest, that the slave was subject to the lien of the original debt, with six per cent., instead of the amount in the new note with ten per cent.; that the new note neither destroyed nor increased the amount of the original liability; that so much of the decree as subjected the slave to the payment of the debt of the last note, with ten per cent., was, so far as regarded the rate of interest, erroneous. The deed of trust on the negro was to secure the payment of the debt, with six per cent., not ten per cent., and the negro should have been considered as liable to the lien of the original debt, with six per cent. only. This is undoubtedly the correct view, for the lien continues on the original contract and indebtedness of the party.

If such is the law in the case of personal property, there is a much stronger argument for applying it in the case of real estate. To permit the lien for the full amount of ten per cent., as stipulated for in the new contract, would be virtually charging the land by parol, in contravention of the statute of frauds.

The judgment will therefore be reversed and the cause remanded, with directions to the court below to modify its decree, by calculating the interest at six per cent. only. The other judges concur.

AUGUST KAUFMANN, Defendant in Error, vs. EMIL SCHILLING,
Plaintiff in Error.

1. *Replevin—Property in bulk—Separation of—In what cases action will lie.*—Generally where property cannot be identified or separated so as to be seized in kind, replevin will not lie. But where goods mixed are of the same nature and value, although not capable of an actual separation by identifying each particle, yet if a division can be made of equal value, as in the case of oats, corn or wheat, either party may claim his aliquot part by this action.

Error to Jefferson Circuit Court.

Henry F. Ahloers, for Plaintiff in Error.

Replevin will lie only for property which can be specifically distinguished from all other articles of the same kind, by indicia, or ear marks or otherwise. (Blackst. Comm., Vol. I, p. 122, Side p. 151; Bouv. Law Dic., vol. I, [12 Ed.] p. 40; Gray vs. Parker, 38 Mo., 160.)

P. Pipkin, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding in the nature of replevin for the recovery of thirty-five bushels of oats, brought before a justice of the peace under the provisions of the statute in regard to the claim and delivery of personal property (2 Wagn. Stat., 817, § 1). On a trial in the justice's court, plaintiff had judgment, and in the Circuit Court the same result followed. The only question of any importance in the case is, whether, under the circumstances, replevin was the appropriate remedy. From the record it seems that plaintiff leased of defendant a farm for the period of one year, for which he was to pay one-half of all the crop raised. The oats in controversy were raised on the farm by the plaintiff, and the thirty-five bushels he claimed as his proportionate share of the balance to be divided. The oats were stored in the house on the premises which the plaintiff had left, and the defendant had taken possession of and refused to give them up. Plaintiff had never delivered or measured any of the oats on hand to the defendant, and when the constable executed the writ, he measured

the thirty-five bushels out of a lot in the house and delivered them to the plaintiff.

The theory upon which the court tried the cause, and which marks the respective positions taken by the counsel in this court, is defined by the declaration of law given for the plaintiff, and one refused for the defendant.

For the plaintiff, the court instructed the jury that if they should find from the evidence that the oats in controversy had been raised on the farm mentioned in the lease, by the plaintiff, and that the same had not been delivered to the defendant and measured to him as his half of the crop of oats, then the plaintiff was entitled to the possession thereof, and the jury should so find.

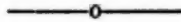
The defendant asked the court to declare the law to be, that even if the jury should find from the evidence that the plaintiff, when this action was brought, was entitled to the quantity of oats claimed by him, still if such quantity at that time formed a portion of and was intermingled with a large quantity of oats belonging in common to plaintiff and defendant, and was not specifically set apart or designated in some way as the portion coming or belonging to plaintiff, then the plaintiff could not recover and the jury should find for defendant. This declaration the court refused.

It is undoubtedly true that in an action in the nature of replevin, for the recovery of specific chattels, their identity must be shown before they are liable to seizure. (*Gray vs. Parker*, 38 Mo., 160.) If the personal property sought to be recovered, is not susceptible of identification or separation so as to be seized in kind, replevin is not the proper or appropriate remedy. But where goods are mixed and are of the same nature and value, although not capable of an actual separation by identifying each particle; yet if a division can be made of equal value, as in the case of oats, corn or wheat, then each party may claim his aliquot part. (*Story on Bailm.*, § 40.) In such cases, the owner is allowed to take his own share of the bulk, kind for kind, and measure for measure. (*Inglebright vs. Hammond*, 19 Ohio, 337; *Ryder vs. Hathaway*, 21 Pick., 305; *Morris on Replev.*, 90.)

In the case of *Henderson vs. Lauck*, (21 Penn. Stat., 359) where there was an agreement for the sale of corn, to be paid for on the delivery of the last load, and the corn as hauled to the buyer's mill, was emptied in a heap with other corn, and after the delivery of the last load, the buyer failed to pay, it was held that the mixture did not prevent the reclamation of as much of the corn as the vendor delivered, and that an action of replevin was a proper proceeding for its recovery.

Of course these authorities all apply to cases where the mixture was not willful and the party was not guilty of any wrong. But here the plaintiff raised the oats and was entitled to their possession till a separation or measurement took place, and the proper share was delivered to the defendant, for by the terms of the lease plaintiff was to deliver defendant half at whatever place he might designate. When defendant acquired the possession, by getting control of the house in which the oats were stored, after plaintiff's departure therefrom, he had no right to retain the proportionate share to which plaintiff was entitled. As the oats were all of the same quality, when it was ascertained how many belonged to plaintiff, no valid reason is perceived, why he could not, under this proceeding, obtain them in kind.

I think the judgment should be affirmed; the other judges concur.



H. SLOAN & COMPANY, Respondents, vs. ST. LOUIS, KANSAS CITY AND NORTHERN RAILWAY Co., Appellant.

1. *Common Carriers—Sufficiency of vehicles determined by in first instance.*—It is the business of common carriers to have vehicles suitable for the transportation of the freight shipped, and they are responsible for losses occurring in consequence of defects in this regard. But the carrier is the judge of the sufficiency of his carriages in the first instance.
2. *Common Carriers—Flat Cars—Standards—Hay, shipment of.*—A railroad held not liable for standards placed upon flat cars to insure the safe transportation of hay, the standards having been erected by the shipper voluntarily and without any contract with the company.

Sloan & Co. v. St. L., K. C. & N. R. R. Co.

Appeal from Adair Circuit Court.

W. H. Blodgett, and Ellison, & Ellison, for Appellant.
De France & Halliburton, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This suit was for the value of certain work and labor done and materials furnished defendant.

The plaintiffs were shippers of hay from Kirksville to St. Louis—they did ship a large quantity, under a contract with defendant, about which there is no dispute. The cars furnished by defendant for the hay were flat cars without standards, and the plaintiffs, believing that hay could not be carried on such cars without standards, had standards put on them, costing about \$70. And this suit is to recover the value of the standards thus placed on defendant's cars. There was no conflict of evidence—the facts above were stated by a single witness—and the court was asked to declare that on such evidence the plaintiffs could not recover—but the court refused so to declare the law—but instructed the jury to allow plaintiffs the price or value of the standards, if they thought the hay could not be shipped without them and the defendant did not furnish them.

We have not been referred to any authorities which would authorize the judgment in this case. Upon principle, it would seem that it was the carrier's business to have vehicles suitable for the transportation of the hay, and if any loss occurred by reason of defects in the cars, the responsibility would rest on the carrier. But the shipper is not to judge whether the cars are sufficient; the carrier is the sole judge of the sufficiency of the vehicles in which it is proposed to carry freight. It does not appear that the attention of defendant was called to the supposed deficiency in the cars, or that the defendant was requested to furnish other cars; or that there was any special contract concerning these standards, which the plaintiffs voluntarily put up on the flat cars. There was no implied assumpsit on the part of the defendant.

Judgment reversed; the other judges concur.

CHARLES DARRIER, Appellant, vs. BERTHA DARRIER, Respondent.

1. *Husband and wife—Conveyance secured by wife from husband's funds—Advancement.*—A conveyance of land which a wife secures to herself in her own name, with her husband's funds, will be presumed to be an advancement for her benefit. But whether such be the fact is a question of intention, and evidence on that point is admissible especially where the husband denies such intention. And *semble*, that fraud, in any form, in obtaining the title against his consent, will itself rebut the presumption.
2. *Practice, civil—Bill of Exceptions—How amended—May be by Supreme Court.*—A bill of exceptions is, when duly filed, a part of the record, and may, where there is matter to amend by, be amended on motion, to the same extent and subject to the same restrictions as any other portion of the record. And the Supreme Court will, on a proper showing, make such amendment without returning the bill to the lower court merely for that purpose.
3. *Husband and Wife—Competent witnesses, where opposing parties—Agency of wife.*—In suit by the husband against the wife, to divest the latter of title to land, the parties are competent witnesses against each other in regard to communications between them. And the agency of the wife having been satisfactorily established, the same rules of evidence will prevail as between any other principal and agent.
4. *Husband and wife, confidential communications between.*—A letter from a husband to his wife, directing her to purchase certain land for him, may be introduced in evidence, and does not fall within the rule which forbids the disclosure of confidential communications.
5. *Supreme Court—Equitable relief by.*—The Supreme Court may, at its pleasure, grant that relief that should have been accorded by the trial court.

Appeal from Jefferson Circuit Court.

L. Gottschalk, W. C. Kueffner, with Joseph J. Williams, for Appellant.

I. The court should have admitted the plaintiff's testimony with regard to the instructions sent by him to his wife as to how the title to the land was to be taken, and should also have admitted the letter from the plaintiff to the defendant on the same subject.

The text books, laying down the rule as to the exclusion of evidence of confidential communications between husband and wife, only refer to cases where the communication is to be proven by either against the party making it. (1 Greenl. Ev., 12 Ed., ch. 13, p. 286, § 254; ch. 2, p. 390, § 337; 2 Stark. Ev., 7 Am. from 3 Eng. Ed., part 1, 551; Cornell vs. Vanartsdalen, 4 Penn. St., 374; Cassin vs. Delaney, 33 N. Y., 178.)

II. The plaintiff was entitled to a decree upon the answer of the defendant and the evidence in the case. The law is well settled that when real estate is bought with the money of one person, but the title is taken in the name of another, a trust results in favor of the party advancing the purchase money. (*Johnson vs. Quarles*, 46 Mo., 426; *Kelly vs. Johnson*, 28 Mo., 249; *Perry on Tr.*, ch. 5, p. 97, § 125.)

The rule that where a father or husband takes the title to land, purchased with his money, in the name of a wife or child, the presumption of a resulting trust is rebutted in favor of an intended advancement or settlement, applies only when the father or husband himself procures the deed to be made in favor of the wife or child; but when the nominal purchaser procures the conveyance, it must in addition affirmatively appear that he acted, when he took the title in his name, under the authority of the person advancing the purchase money. Otherwise, a trust will result in favor of the latter. (*Peer vs. Peer*, 3 Stock., 345.)

And even when the husband himself directs the title to be taken in the name of his wife, it may still be shown that no settlement was intended. And for this purpose, evidence may be received of cotemporaneous acts and facts, as well as of acts and facts so immediately after the purchase as to be fairly considered a part of the transaction. (*Perry on Tr.*, ch. 5, p. 119, § 147.)

III. The answer of the defendant herself shows that no settlement was intended. According to her own statement the conveyance was not made as a settlement and provision absolutely, but only to become a settlement in the event of the plaintiff's death during the war.

The war being over, the husband is entitled to a re-conveyance. In a somewhat similar case, it has been held that a trust resulted in favor of the husband. (*Cotton vs. Wood*, 25 Ia., 45.)

IV. The court should have permitted an amendment of the bill of exceptions. A court has authority, as well after as before an appeal, to amend its records according to the truth

so that they should accurately express the history of the proceedings which actually occurred prior to the appeal. (*De Kalb County vs. Nixon*, 44 Mo., 342; *Pockman vs. Meatt*, 49 Mo., 348; 1 *Tidd's Prac.*, 9 Ed., ch. 29, pp. 712, 713; side pp. 713-14.) And this rule applies as well to record entries as to papers filed of record, and it applies to bills of exception, they being part of the record.

Henry F. Ahlvers, for Respondent.

I. This being an action by a husband against his wife, to obtain the title to land which is in the name of the wife, is not based on the doctrine of a resulting trust in favor of a person who furnishes the purchase money. (2 *St. Eq. Juris.*, §§ 1202-4, pp. 420-22, 8 Ed.)

II. The testimony of appellant, that he had written to respondent to have the title made in his name, was properly excluded, for he testified to a communication from him to his wife. (*Moore vs. Moore*, 51 Mo., 118; *Buck vs. Ashbrook*, 51 Mo., 539; *Berlin vs. Berlin*, 52 Mo., 151.)

III. The motion to amend the bill of exceptions by inserting a certain letter therein, was properly overruled. Appellant should have proven, in support of such motion, that the letter was not copied in the original bill by mistake, oversight of the attorney or clerk, or the like.

IV. The judgment overruling said motion, has no business in this court. It came here neither by writ of error, nor by appeal, nor in any other way, except that appellant filed a transcript thereof here.

SHERWOOD, Judge, delivered the opinion of the court.

This case presents the anomalous feature of a husband seeking to divest his wife of the title to certain school lands, which formerly belonged to school township number six, in Jefferson county, charging in his petition that, while he was in the United States army, the defendant, with money which he had furnished, in contravention of her express promise and of his explicit instructions to take the title in his name, had fraudu-

Darrier v. Darrier.

lently succeeded, by means of a deed from one Herman Darrier, and of certain patents issued by the State of Missouri, in taking the title in her own name; which fraudulent conduct, plaintiff never discovered until upon his return home from the army, in the year 1865.

The answer denied all the material allegations of the petition, and, in addition thereto, claimed that it was at the special instance and request of plaintiff, who, being engaged in active service, and aware of the consequent uncertainty of his life, and desirous, as he frequently said, to make provision for his wife in the event of his death while a soldier, that the title to the land was taken in her name, of which fact he was cognizant for a number of years; but raised no objection and made no complaint, until shortly before suit brought. A difficulty having arisen between plaintiff and defendant, he therefore desired to divest her of title. The statute of limitations was also pleaded. A reply was filed, denying the chief averments of the answer.

The testimony of the defendant establishes with conclusive clearness, that it was the funds of the plaintiff, viz: \$300 in bank, and the proceeds of the sale of five shares of stock in the Franklin Insurance Company, as well as some other money, sent by plaintiff to her while he was in the army, with which the land was purchased. It is true, she also testifies that during the absence of her husband, she earned some money by her own labor; but she does not pretend that any portion of her earnings was applied towards paying for the land; and in addition to this, she admits she was, at the time of her marriage to plaintiff, entirely destitute of means. In support of the allegations of her answer, she testifies that she received a letter from her husband, authorizing her to arrange the business about the land and about paying for it, and that this was *the only letter on the subject she had ever received from the plaintiff*. She gives no date to this letter (which it seems was lost) but says she took it to St. Louis to Dauestraw, and he came down with her to Jefferson county to arrange the business, and Dauestraw, who corroborates her

testimony with his own, says the letter was received in the early part of May or June, 1862, or about that time, and authorized defendant to buy the land, when it should be sold by the sheriff of Jefferson county, and take the conveyance in her own name; that witness went to Hillsboro with defendant, at her request, to assist her in effecting this purpose, and arranged matters in accordance with the instructions contained in the letter. He says further: "a deed of trust or claim of some kind was released; we paid the sheriff a certain amount of money, and the land was not sold on that day. I arranged with the sheriff that the property should be transferred to Mrs. Darrier in her name, and left her there to have the papers drawn up and the arrangement completed. This was some twelve years ago, and I do not clearly recollect the amount of money or the nature of the claim to be satisfied." The defendant also testified that she was living in St. Louis, in the fall of 1862, and winter and spring of 1863; that plaintiff was at home in St. Louis, from October, 1862, till March, 1, 1863, as a recruiting officer, and after returning to his regiment in the South, returned again to, and remained with her at home, for two weeks in the fall of 1863; that she informed him of having taken the title to the land in her own name, and he said "all right." *When* she so informed him is not stated, nor is it stated where she was living at the time.

She further stated that the patents for the land were sent to the clerk of the court at Hillsboro, and after being recorded were brought by the clerk to her in the *winter* of 1863, in St. Louis, where she was still living, and that she had never seen them until that time.

Where the purchaser of land pays the purchase money and takes the title in the name of a stranger, the presumption at once arises that the benefits accruing from the purchase are to go to him who paid the consideration. But a different rule prevails and a different presumption springs into being where, under similar circumstances, the conveyance is taken in the name of a wife or child; there, the obligation under

which the purchaser rests to provide for the one in whose name the title is taken, will countervail any inference that a resulting trust was intended in favor of the actual purchaser. (Perry on Trusts, § 143; 2 Sto. Eq. Jur., § 1201 and cases cited.)

Looking at the case before us, then, from that point of view alone, it may be assumed as a basis at least of further remark, that the defendant had, at the conclusion of the evidence offered in her behalf, made out, *prima facie*, that an advancement must be presumed; and therefore, that the conveyances which she had secured in her own name should be regarded in that light. Whether the purchase, however, in the case at bar, was designed to be consummated in the manner claimed by the defendant, was a question of pure intention; and the way was consequently open for the admission of evidence to establish the design the plaintiff had in contemplation at the time of furnishing the purchase money. (Perry on Trusts, § 147; Hill on Trustees, 97; Livingston, vs. Livingstone, 2 Johns. Ch., 540; Wilton vs. Divine, 20 Barb., 9; Harder vs. Harder, 2 Sandf. Ch., 17.)

This rule, as to the admissibility of evidence showing intention, would hold, as shown by the above cited authorities, even where the taking of the title in the name of the nominal purchaser *was authorized* by the furnisher of the money; and, *a fortiori*, evidence should be admissible where the authority, as in the present instance, is placed in doubt by the owner of the fund with which the purchase was effected denying the fact of such authorization. And it has been held that if fraud in any form characterizes the obtaining of the title by a wife or child, against the consent of the husband or father who pays the purchase money, that this of *itself* will rebut the presumption of an advancement, and raise a trust in behalf of the husband or father. (Perry on Trusts, § 148; Peer vs. Peer, 3 Stock., 432; 13 Ia, 368.) The substance of the evidence offered by the plaintiff in support of his denial in the particular referred to, and in support of the allegations of his petition will now be briefly stated.

The testimony of Uhlmann showed that plaintiff was possessed of some means before his marriage, in 1856, and occasionally received drafts from Europe, and one time in that year had loaned witness \$200.

The testimony of Schiffmann was to the effect that plaintiff was the possessor of a small amount of means before his marriage; that plaintiff frequently sent his wife letters and money during the war, and that witness had seen, though he did not read, one of these letters, which accompanied a package of \$1,000 sent by plaintiff to defendant in the latter part of 1862. The plaintiff testified that in May, 1861, he enlisted in the army, was commissioned lieutenant shortly after his enlistment, and continued in the army till the close of the war, in 1865; that he sent defendant money to pay for the land, writing to her at the same time to have the title taken in his name, and that he wrote more than once to that effect; that when at Camp Hoffman, Arkansas, he wrote a letter to defendant, and sent it to her by mail to Jefferson county, Missouri, on the day it bears date, and on his coming home, in 1865, he found this letter in defendant's possession, among other papers relating to the land. The letter referred to bears date Camp Hoffman, Ark., April 5, 1862; is addressed to defendant; informs her that plaintiff has sent her \$400 through Schiffmann, and requests her to buy the land of Herman Darrier; pay all the debts due on it, *so that plaintiff could get a perfect title in his own name*. The letter also refers to the fact of Herman Darrier having been informed on the subject by plaintiff; that, in case a sufficient amount of money had not been already furnished by plaintiff, he would furnish the residue in two months; but the belief is expressed that as "Kuene has paid," defendant would be able to settle the whole matter then. An estimate is then made as to the amount Herman Darrier owes on the land; and that portion of the letter, referring to the business, concludes with an earnest request that defendant should give it her special attention.

Darrier v. Darrier.

The plaintiff also testified that he never, at any time, authorized the defendant to have the land conveyed to herself, nor did he know that it had been thus conveyed, until after his return home, in the year 1865, but supposed, up to that time, that the patent and title papers were in his name; that, upon ascertaining that the land had been conveyed to his wife, he was dissatisfied and consulted a lawyer, but the fee asked was so large that he had deferred the matter until the present suit; and he further testified that since his return home, in 1865, he had lived with his wife on the land in dispute as his home.

The other evidence offered on behalf of plaintiff consisted of a deed whose expressed consideration was one dollar, and date April 7, 1862, from Herman Darrier to defendant, conveying to her the land in controversy, and authorizing her to receive the patents therefor in her own name; certain patents for the same land, dated December 6, 1862, recorded April 20, 1863, from the State of Missouri to defendant as assignee of Herman Darrier; certain receipts given to the defendant by the treasurer of Jefferson county dated respectively, July 7, November 6 and November 17, 1862, for money paid school township No. 6; a deed of trust dated July 28, 1860, executed by Herman Darrier, conveying the land in question, to secure a note due the plaintiff for \$500; a deed from the sheriff of Jefferson county, dated January 15, 1862, but acknowledged December 15, of that year, purporting to convey the land in suit to plaintiff, under and by virtue of a power contained in a deed of trust dated July 28, 1860, executed by Herman Darrier to the former sheriff to secure Charles Darrier in the payment of a promissory note described in the deed of trust. A notice and a letter accompanied the deed of the sheriff, and were attached thereto. The letter is from the plaintiff to the sheriff of Jefferson county, is dated at St. Louis, Nov. 10, 1862; states that plaintiff is the holder of a note, for \$500, due in twelve months, dated July 28, 1860, to secure which Herman Darrier had executed his deed of trust of that date, and requests the sheriff to sell the land,

cattle, etc., described in the deed, and inform the plaintiff by a letter addressed to him at St. Louis, of the day of sale. The notice is in usual form, dated Nov. 16, 1862; refers to the deed of trust mentioned in plaintiff's letter; describes the land sued for, and also certain personal property, and designates the 13th day of December, 1862, as the day of sale. Certain tax receipts, showing the payment by plaintiff of the taxes on the land in dispute, marked the close of his case.

The evidence offered on behalf of the plaintiff must be regarded as far more satisfactory than that offered on the part of the defendant; and this is so for several reasons:

1. The letter purporting to have been written at Camp Hoffman, Arkansas, April 5, 1862, by plaintiff to defendant, was offered in evidence, was open to inspection, so that its genuineness and the marks of its authenticity were capable of ocular demonstration; and the very fact of its existence and the nature of its contents did not depend upon the feeble and imperfect impressions produced upon "slippery memory," as was the case in regard to the letter testified to by defendant and Dauestraw.

2. The plaintiff states that the letter of April 5, 1862, was sent by mail to defendant, in Jefferson county; and that she lived there about that time, is apparently true, because the plaintiff would scarcely have authorized his wife to proceed to a distance to attend to a business matter of the kind mentioned in the letter; and besides, Herman Darrier (who is probably a relative), is seemingly referred to as one at no great distance; and the defendant herself, says, that she took the *only* letter which she ever received on the subject, to *St. Louis* to Dauestraw, and he says the letter was received "the latter part of May or June, 1862, or about that time," and that he went with her down to Hillsboro, to arrange the business for her, and left her there to have it completed. That she was there "about that time" is shown by the receipt dated July 7, 1862, given to her by the treasurer of Jefferson county, showing a personal payment by her of \$550.

3. If credence is to be given to defendant's statement that the letter testified to by herself and Daunestraw was the *only* one which the plaintiff wrote her in relation to purchasing the farm; and Daunestraw is right as to the time of that letter's reception, viz., "the latter part of May or June, 1862, or about that time," then there is no refuge from this result; that, without any authority whatever from plaintiff, she induced Herman Darrier to convey her the land, and authorize her to receive the patents therefor on the 7th of April, 1862, by his deed of that date; and if she obtained that deed without authority, such unauthorized act, being established, would afford very strong ground for the presumption that she was actuated by the same motive when securing the issuance of the patents to herself.

4. It is hardly within the range of probability—and probability is the chief corner-stone of evidence—that the plaintiff would, by his letter of April 5, 1862, authorize the purchase of the farm in *his own name*; then, by another letter, written shortly thereafter, direct the defendant to take the title in *her name*; and then, in a few months subsequently, proceed to have the land sold under the deed of trust, and take the title arising from such sale to *himself*. And that he did thus take the title, the product of the sale, is shown in a manner not to be gainsayed, by the deed of the sheriff to him. Nor is there any importance to be attached to the fact that such deed is dated January 15, when the date should be *December* 15, as the accompanying papers show in an evident manner that the misdating of the deed was a mere clerical error; and, therefore, it will not be assumed that the deed was made almost a year before the sale therein mentioned took place.

5. Motive has been not inaptly styled "the mainspring of human action." No conceivable motive could have prompted the plaintiff to play fast and loose; to act as he evidently did act, if what defendant testifies in relation to the alleged lost letters, and if the plaintiff's letters to the sheriff, and the recitals of the deed of the latter to the plaintiff, are all to be

taken as true. For, at the very time when the plaintiff was taking the necessary steps to foreclose, by sale of the school land, Herman Darrier's equity of redemption therein, defendant had not only acquired that, in the previous April, but had her plans laid for the issuance of the patents to herself; and which were so issued but one short week before the sale took place, at which plaintiff bought. And in regard to Dauestraw's impressions in reference to the alleged lost letters, they are, as he himself admits, very vague; and no doubt he was imposed on at the time, and the impressions made on his mind were for the most part false ones, produced by conversations with the defendant, and not by the contents of any letter which he read. And the craft which would prompt the obtaining of the deed from Herman Darrier would doubtless be equal to such an occasion.

6. The plaintiff's testimony is positive, that he knew nothing of the defendant having acquired the title, until his return home at the close of the war in 1865; but the defendant does not fix any date at which she gave him that information. It does not appear that he returned to this State but *twice* during the war's continuance, even from defendant's testimony—once in October, 1862, when he remained until March, 1, 1863, and the second time in the *fall* of 1863, remaining two weeks. She also states that the clerk brought the recorded patents to her in St. Louis in the *winter* of 1863, and that she had never seen them until thus brought. So that if she intends to be understood as having informed her husband in respect to the matter, in the winter of 1862-3, this information was *premature*, as the patents were not issued till December 6, 1862, and not recorded until April, 20, 1863; and she never saw them, according to her own story, before the *winter* of 1863, and this was *after* her husband's last departure to his regiment.

7. But an inconsistency perhaps more glaring than any in the defendant's narrative is this: If her husband had really authorized her to secure the title of the land to herself, no necessity could possibly have arisen to inform him of a fact with which he was already perfectly familiar.

Darrier v. Darrier.

For these reasons there is no "shape of likelihood" in the defendant's version of the affair. Again, were we to lay aside all legitimate deductions from the evidence, it is by no means free from doubt that defendant has not admitted sufficient facts in her answer to warrant the relief prayed for by plaintiff; because it plainly appears from the answer itself, that she was permitted to take the title for only a *temporary* purpose, i. e., for making provision for her in the event of the "*unexpected death of plaintiff while a soldier*," & as the necessity that gave rise to such conveyance has ceased; and as such admission rebuts the presumption of an intended advancement, it would seem, should we desire to follow the rulings in *Cotton vs. Wood*, (25 Iowa, 44) that plaintiff ought to prevail in this suit, regardless of the very convincing evidence which he has adduced. But regarding that evidence as well nigh conclusive in his favor, there exists no occasion for a decided expression of opinion on the point suggested; and therefore it will be left open to further and future examination.

It will have been observed that I have treated plaintiff's letter of April 5th, 1862, as forming a part of the record, and so it ought to be regarded. The original bill of exceptions, filed at a former term, refers to it in the most unequivocal terms, thus: "Plaintiff also then offered in evidence a letter in the German language with a translation of the same into the English language, signed by himself, dated Camp Hoffman, Arkansas, April 5, 1862, addressed to the defendant," etc. And, on motion made to amend the original bill of exceptions, by inserting the words, "of which the following is a copy," it was admitted by defendant's counsel, that this letter was actually offered in evidence, was placed, and still remains with the papers and files of the cause in the clerk's office. A bill of exceptions, when duly filed, constitutes a part of the record; and is consequently subject to the operation, in appropriate cases, of amendatory motions to the same extent and under the same restrictions as any other portion of the record; and this case is deemed one of that char-

acter, as there was ample matter to amend by. (Wallahan vs. The People, 40 Ill., 103; Debb Co. vs. Hixon, 44 Mo., 342; Pockman vs. Meatt, 49 Mo., 345; 1 Tidd's Pr. 714.) The motion made by plaintiff should therefore have prevailed; and without going through the bare and meaningless formality of sending the case back for that purpose, we have treated the letter as incorporated in the original bill.

But it is urged here, as it was with success in the lower court, that neither the letter nor plaintiff's testimony in regard to it, were admissible. In reference to this letter, it is quite sufficient to observe, that had the same matter been contained in *a power of attorney*, no one would doubt its admissibility, or regard it as a confidential communication between husband and wife. How then, can that admissibility be affected, in the present instance, merely because the instructions sent in the letter do not put on the formalities or assume the shape of a legal instrument. And if the *letter* is held not within the rule precluding the disclosure of confidential communications, surely the *testimony* of the plaintiff respecting that letter could not be deemed inadmissible. Besides, this court has repeatedly held that husband and wife are, as opposing parties, competent witnesses (Moore vs. Moore, 51 Mo., 118; Berlin vs. Berlin, 52 Mo., 151); and the agency of the wife having been satisfactorily established the same rules of evidence would prevail as between any other principal and his agent.

In conclusion: This suit was brought August 5, 1873; there has been no adverse possession, nor adverse claim; and according to plaintiff's testimony, which is undisputed on this point, he was unaware of the title being taken, otherwise than as he directed, until 1865. Under such circumstances, it is very clear the statute of limitations would not run.

The judgment is reversed, and this court, proceeding to accord to plaintiff that relief which he should have received at the hands of the trial court, an appropriate decree will be entered here, divesting defendant of all title in the premises, and vesting the same in the plaintiff. All the other judges concur.

Eck v. Hatcher, et al.

JOHN ECK, by his Guardian THOMAS T. TAYLOR, Appellant,
vs. THOMAS E. HATCHER, et al., Respondents.

1. *Practice, civil—Testimony of opposite party—How compelled.*—Sections 3, 7 & 9 of the act concerning witnesses, were intended to have the office and effect of the old chancery practice, in regard to interrogatories appended to a bill and to sift the conscience of the opposite party in like manner.
2. *Notice—Party will be affected with, when put on inquiry.*—In suit to set aside the sale of land for fraudulent practices, the purchaser will be held to have knowledge thereof where the circumstances of the sale evidently required investigation and were such as to put him on inquiry.

Appeal from Adair Circuit Court.

O. D. Jones & W. C. Hollister, with Harrington & Cover,
for Appellant.

Pratte & McCabe, with Ellison & Ellison, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This is a suit instituted by a pauper, through his guardian, to set aside certain conveyances alleged to have been fraudulently obtained by the defendants, one of whom is his wife, the second a son-in-law of his wife, and the third a purchaser from the second.

The facts upon which the petition is based, and which seem to be beyond controversy, are these: The plaintiff is a German, at the time of the trial about seventy-five years old, speaking the English language imperfectly, and though a very good farmer, a man of excitable temperament, and of such occasional eccentricity of habits, as to raise a question of his sanity. He lived, in 1870, in Quincy, Illinois, and married a woman, one of the defendants, who was proved to be of bad repute and the keeper of a house of ill-fame, in which her daughter, the reputed wife of another defendant, played a conspicuous part. This woman was about forty years old, and Eck, the real plaintiff, who was seventy-two, was entrapped into a marriage with her. Eck was a man of considerable means, having from four to six thousand dollars in money or notes—and this was the lure which tempted the defendant, his wife, to marry him.

Eck and his wife, in 1871, removed from Quincy, and came to Lewis county and lived awhile with one Steffin, whose farm was near the town of Newark, in Knox county, and who was, I infer from his name, probably also a German by extraction or birth, and perhaps an acquaintance of Eck's. The object of Eck was to buy a farm, and after negotiating with McElhany, who was a farmer in Knox county, and had a farm for sale, and, concluding not to purchase it, he bought the farm of Brown, which was near Newark, for \$2,800 or \$3,000. Eck and his wife then moved from Steffin's place to this farm. The deed to the place was made to Eck, but this was not in accordance with the designs of his wife, who insisted that the deed should be made to her.

It seems that there lived at Newark, at the time, one James M. Balthorpe, who was an attorney at law, and a dealer in cattle, and that McElhany, who imagined that he had a right of action against Eck, for failing to comply with his alleged verbal promise to buy his farm (which Eck denied), employed this Balthorpe to bring a suit against him, or to threaten him with one. This occasioned frequent visits from Balthorpe to Eck's house, and as he knew, if he was a lawyer at all, that there was no foundation for any such action, he soon formed an alliance with Mrs. Eck, to aid her in driving her husband into the execution of a deed to his wife, which was finally effected on July 1, 1871, when Eck executed such a deed.

In the fall of 1871, John E. Grandy, another defendant in this case, who purported to be the husband of the daughter of Mrs. Eck (proved to have been a prostitute in Quincy by the chief of police of that city), with his wife, came over from that city and made their home at Eck's house.

After this accession to the household, the old man Eck seems to have succumbed, and, under various forms of persecution, devised by his wife and her son-in-law and their lawyer—aided by some neighbors, among whom the most prominent was Jeremiah Moore,—was finally intimidated into the execution of a deed to this son-in-law, on the 22d of February, 1872. It is not clear that Eck ever signed this deed—

he swears on the trial that he did not—but whether he did or not is immaterial. There is no pretense that this deed or the one to his wife was based on any consideration whatever, unless we attach some importance to the pretension that he promised to convey *all his property* to his wife, previous to his marriage—a promise which, if proved, no sane man would ever comply with, and no court would ever compel him to comply with.

Thus, about the 1st of March, 1872, but little over a year after his purchase, the conspirators against Eck succeeded in getting the title to this land in this man Grandy, and then it became necessary as soon as practicable, to put that title in some innocent purchaser, for a valuable consideration without notice. It would have been manifestly a hopeless undertaking to find such a purchaser in the neighborhood of Newark, where Eck and his character, and the character of his wife and the pecuniary condition of her son-in-law, and the lawsuits and other controversies between the parties, were notorious. Accordingly Balthorpe starts to Palmyra, the county seat of a neighboring county, and calls upon the defendant, Hatcher, said to be a citizen of good standing and ample fortune, worth from seventy to eighty thousand dollars, and tells him of this farm being in the market at \$1,800, and tells him (as he swears) that and nothing more. Hatcher agrees to buy, borrows of Balthorpe one thousand dollars, being at that time, *short*; dispatches Balthorpe with a letter to Jeremiah Moore, the neighbor of Eck, heretofore named, authorizing said Moore to purchase, and the purchase is consummated, and a deed to Hatcher made on the 20th May, 1872. And then Mrs. Eck and her son-in-law, Grandy and his wife, through the aid of this Jeremiah Moore, who loaned his horse and driver to assist them, immediately before daybreak the next morning, after the execution of this deed, went to Shelbina, on the railroad, and left for parts unknown, and have never been since heard from; and thus, Eck was driven from his house, stripped of everything he had, in the course of one short year, and very soon afterwards was a pauper, in charge of the county, and found by an inquest to be insane.

Negroes in the neighborhood were placed in possession of his house by Moore, and when Eck ceased to disturb them, Moore's son occupied, as a tenant, under Hatcher. These facts are really undisputed, though there were witnesses called on the question of Eck's sanity, on which, as usual, very different opinions were expressed. We attach no importance to this question or to the opinions of the witnesses concerning it. Eck's acts, without regard to any scientific analysis of the precise source from which they sprung, certainly indicated a singularly weak, or badly regulated mind. His marriage, his ineffectual efforts to relieve himself of the incubus which this created, his vacillation in his lawsuits, his conduct when he despaired of success, his credulity in believing the threats of incarceration made by his wife and Balthorpe, and his ultimate submission to what he seemed to regard as his fate, are enough to show that he was unfitted to cope with such shrewd and unscrupulous speculators as he had to deal with. The details of the evidence in this case, which show these facts, seem to be unnecessary, since the only point relied on here, and probably the only one made below, is that Hatcher is an innocent purchaser.

Hatcher was subpoenaed as a witness by the plaintiff, but never appeared. His answer denies all knowledge of the facts except as they appear of record—but was filed by his attorneys, and not sworn to. He declined to appear and testify. It seems that Balthorpe was the first who advised Hatcher of the land being in market, and that Hatcher made Moore his agent to purchase it. Moore lived on a farm immediately adjoining that of Eck, and knew the whole history of the difficulties between Eck and his wife, and of the lawsuits, among which was one in which Eck was plaintiff, to set aside the deeds to his wife and Grandy, and which was undetermined at the date of Hatcher's purchase through Moore.

Hatcher, it seems, bought the land without even looking at it. All that he was informed about by Balthorpe was the price. But Balthorpe declares that Hatcher was well acquainted with the land before. Upon this point Hatcher

was himself competent to testify, and our statute (Wagn. Stat., 1373, § 3) declares that "any party to any civil action or proceeding may compel any adverse party, or any person for whose immediate and adverse benefit such action or proceeding is instituted, prosecuted or defended, to testify as a witness in his behalf, in the same manner and subject to the same rules as other witnesses, provided that the party so called to testify may be examined by the opposite party, under the rules applicable to the cross-examination of witnesses." The 7th section declares that "if a party, on being duly summoned, refuse to attend and testify, either in court or before any person authorized to take his deposition, besides being punished himself as for a contempt, his petition, answer or reply may be rejected, or a motion, if made by himself, overruled, or if made by the adverse party, sustained."

These provisions of our statute, which have been there since the revision of 1835, were probably designed as a substitute for the ancient chancery practice in regard to interrogatories appended to a bill, and had the same object in view, which was to give a party an opportunity to sift the conscience of his adversary. If the interrogatories were unheeded, the court of chancery regarded the party refusing to answer as in contempt; and our statute, on the failure of the parties summoned to appear and submit to examination as a witness, authorizes the court to reject his petition or answer or reply. It will be observed that the answer of Hatcher is not sworn to, nor was it necessary under our practice that it should have been.

There is, therefore, no proof in this case entitled to any weight, that Hatcher had the least knowledge of this farm, except that Balthorpe swears Hatcher had known it for twenty years.

Hatcher was a dealer in real estate, and, as he was said to be worth \$70,000, had evidently been a successful one. Now, if Hatcher was acquainted with this tract of land and knew its value, he of course knew that \$1,800 was a very inadequate price for it, as it was bought only a year before for near-

ly twice that sum; and the fact that it was offered so low would have induced him to inquire into the causes.

But if we assume the other hypothesis, that Hatcher was entirely ignorant of this tract of land, and was a successful dealer in real estate, then it is clear that his immediate acceptance of Balthorpe's proposal and his immediate transmission, through Balthorpe, of the \$1,800 of purchase money, cannot easily be accounted for except on the ground that Balthorpe had communicated to him all the circumstances under which this farm was so suddenly put on the market.

There can be no doubt that Moore, the agent said to have been selected by him to buy, who was a near neighbor of Eck's, was fully acquainted with all the facts we have above recited. Why Moore was selected, instead of Balthorpe, to consummate this bargain, is difficult to be explained, seeing that Balthorpe was a family connection of Hatcher's, and lent \$1,000 to him to make the purchase, without taking any note for it or any other security, and Balthorpe was a lawyer, competent to transact such business; and Moore was, as the evidence states, "an ignorant farmer;" and Balthorpe must undoubtedly have had the confidence of Hatcher, as Hatcher invested \$1,800 on his representations, and borrowed \$1,000 of him temporarily, to enable him to make this investment. Balthorpe was at Hatcher's house only one night, and the arrangements for the purchase were consummated that night, by Hatcher's borrowing \$1,000 of Balthorpe, and sending by him this sum and \$800 to Moore, authorizing Moore to buy.

The selection of Moore as agent, instead of Balthorpe, would seem to have been from the suggestion of the latter, who clearly saw that his notorious and recorded complicity with Mrs. Eck and Grandy, might give support to a like charge on Hatcher, if he (Balthorpe) was made Hatcher's agent.

There is no doubt that Hatcher had such information from Balthorpe as to put him on inquiry. If he knowingly allowed himself to be used to consummate the schemes of Balthorpe and Mrs. Eck and Grandy, he must abide the

consequences of such complicity. If he really was ignorant of these schemes, and ignorantly allowed himself to be used in this way, he must be charged with gross inattention to his own interests, and a disregard of all the ordinary rules of prudence.

He neglected to inform himself when the circumstances of the sale evidently required investigation and put him on inquiry. We do not, therefore, consider him as a purchaser without notice. There is no doubt, from the evidence, that the previous deeds to Eck's wife and to Grandy were fraudulently obtained, if obtained at all. Upon this point the evidence is clear. The testimony introduced by the defendant is mostly on the subject of Eck's sanity, about which people would of course differ. We have expressed our opinion on this point heretofore, and we consider it immaterial.

We think it entirely unnecessary to cite the authorities in relation to the chancery law, either of England or this country, on this question, although such authorities are extensively quoted in the brief of the counsel for plaintiff. The facts so clearly indicate a concerted fraud which succeeded in reducing the plaintiff in a short time from a condition of pecuniary independence, to one of absolute destitution and poverty, as to require no precedent to authorize the intervention of a court of equity. So far as the wife and son-in-law are concerned, there could be no hesitation, and the plea of want of notice, on the part of the defendant, Hatcher, not having the support of his own testimony, is too transparently flimsy to justify any hesitation or doubt on his account.

We shall, therefore, reverse the judgment of the Circuit Court, and this court will proceed to decree that all the deeds shall be canceled, and that the plaintiff is entitled to the possession of the premises in controversy, and that an appropriate writ issue for that purpose from the Circuit Court of Adair county; the other judges concur.

Huff v. Shepard.

JOSEPH HUFF, Respondent, vs. ELIHU H. SHEPARD, Appellant.

1. *Clerk of Court—Issue of process in his own behalf.*—A clerk of a court of record may issue process in his own behalf as plaintiff.
2. *Practice, civil—Application raising question of jurisdiction, no appearance.*—A rule of court which prescribes that, "application to the court to raise any jurisdictional question shall be deemed an appearance" for other purposes, is invalid. Jurisdiction over the person can only be acquired by the method which the law provides, or by consent of the party.
3. *Practice, civil—Summons—Service in wrong county—Amendment of petition.*—If a summons be served on a defendant in the wrong county, the defect cannot be remedied by filing an amended petition which, if originally filed, would have authorized the service as made.
4. *Practice, civil—Specific performance—Suit for—Final decree in counties of over 40,000 people.*—In a county not having over forty thousand inhabitants, it is erroneous to render a final decree at the return term in a suit for specific performance.
5. *Equity—Specific performance—Contract to sell lands, etc.*—An agreement for the sale of lands, in which it is stipulated that the purchase money is to be paid "on such terms as may be agreed on between said parties," cannot be enforced in equity by a decree for specific performance.
6. *Supreme Court—Equity—Dismissal.*—Cause dismissed by the Supreme Court for want of equity.

Appeal from Iron Circuit Court.

Marshall & Barclay, for Appellant.

I. One prominent clause in this contract, is this: "The balance of purchase money to be paid on such terms as may be agreed on between said parties." If defendant, though able to fulfill his contract, cannot be judicially compelled to do so, the jurisdiction of equity is at an end. (Adams' Eq., p. 81; *Kemble vs. Kean*, 6 Sim., 333; *Wiley vs. Robert*, 31 Mo., 215; *Fry Spec. Perf.*, §§ 185, 203, 221; *Milnes vs. Gery*, 14 Ves., 400; *S. W. R. R. Co. vs. Wythes*, 5 DeG. M. & G., 888; *Potts vs. Whitehead*, 5 C. E. Green, [20 N. J. Chancery,] 50; *Taylor vs. Portington*, 7 DeG. M. & G., 328; *Sto. Eq.*, §§ 751, 767, 736a.)

II. The court below rendered final judgment in this case at the return term, (only two days after the judgment by default). This was in defiance of the statute law, and of the

Huff v. Shepard.

authoritative teachings of this court. (Wagn. Stat., 1039, § 5; 1014, § 5; Dougherty vs. Pres. and Faculty, &c., 53 Mo., 579.)

III. The rule of court in this case pretends to transform a limited appearance for the purpose of raising a jurisdictional point into a general appearance for all purposes. Of this we have only to say, that the law-making power of this State is not yet delegated to the Circuit Court of Iron county, by the people of Missouri, and until such is done, judicial legislation of that kind will not be sanctioned—we believe—by this court. (Wagn. Stat., 1014, § 5; 46 Mo., 110; 33 Mo., 244.)

IV. The court below should have sustained both motions to quash summons, because of the reasons therein given, that the same were issued and tested by the plaintiff in his own behalf and interest, which is repugnant to the maxims of the common law and to the independent spirit of American jurisprudence. *Nemo debet esse judex in propria causa.* (12 Coke, 114a; Wagn. Stat., 421, § 18; 422, § 31; Snydercker vs. Brosse, 51 Ill., 360.)

J. P. Dillingham, with J. W. Emerson, for Respondent.

I. The writ issued by the plaintiff, who was clerk, is not thereby invalidated. No one else was authorized to act. (Wagn. Stat., 258, § 15; 259, §§ 15, 18.) And there is no prohibition in the law against a clerk bringing suit in his court by his attorney, and issuing process thereon as in other cases.

Section 18, p. 421, (Wagn. Stat.) plainly refers only to sheriffs and other purely ministerial officers who are required "to execute process," or perform strict ministerial duties. (11 Verm., 503; 33 Mo., 216.)

II. Where a sale is made and the price fixed, but the terms of payment are to be afterwards agreed upon, and the purchaser after the sale refuses to agree upon any terms of payment, as it is admitted the defendant did in this instance, then the court will give judgment for the amount, precisely as it would do in a case where a sale was made for cash "on time,"

and no time was agreed upon. When no time is fixed for the performance of an act, the party who is to perform it is to have a reasonable time; and this is to be determined by the nature of the act, etc. (4 Mo., 522; 2 Penn., 63; 3 Bibb., 105; 2 Greenl., 249; 29 Mo., 351.)

The case in 31 Mo., 215, upon which appellant relies, is not in point. In that case the agreement was verbal, and no price was fixed. In 10 Mo., 174, it was a contract to convey such lands as the defendant might own at the end of five years in the future, and no land was described or referred to in the contract.

III. Under the general prayer for relief contained in the first petition, "for such other and further relief as plaintiff may be entitled to," it was competent for the court to grant the relief expressly prayed for in the amended petition, viz: for a vendor's lien. And final judgment was properly rendered at the return term. (Wagn. Stat., 1053, § 10.)

IV. It is purely an arbitrary construction to say that final judgment cannot be taken in such suit, when the statute says in express language "in all other cases," etc. Is there any reason that a court may give final judgment in a case of damages, trespass, libel, etc., and yet not when its equitable powers are invoked?

Lewis, Judge, delivered the opinion of the court.

Suit was instituted to compel specific performance of a written agreement. A summons was issued which was not expressed to run in the name of the State of Mo., and afterwards another was issued in proper form. Both were served on the defendant in St. Louis county, where he resided. At the return term, defendant, appearing only for that purpose and "not intending to confer jurisdiction of his person," moved to quash both writs, because they were issued and attested by the plaintiff himself as clerk of the Circuit Court, and the second one for the additional reason that the first had been served. These motions were overruled.

Huff v. Shepard.

On the first day of the term, plaintiff filed an amended petition, which more particularly described the property, which was the subject matter of the agreement. On the sixth day of the term, plaintiff filed a second amended petition asking for additional relief in the enforcement of a vendor's lien on the property. On the next day, he took an interlocutory judgment by default, and two days afterwards this was ripened into a final decree against defendant, in accordance with the prayer of the petition. Defendant's motion in arrest of judgment was overruled.

The points of practice appearing herein demand some attention before we proceed to the substantial merits of the controversy. Defendant's objections against the validity of the second summons were not well taken. The first, being unquestionably void, could not affect the second, which was therefore the only original process in the suit. There is no controlling reason why a clerk should not issue process in his own behalf, as plaintiff. The statutory provision (Wagn. Stat., 421, § 18) for a substitute in certain cases, applies only to the officers who execute process. An interested sheriff, by making a false return, might subject a defendant to judgment without notice in fact of the proceedings. Or, if biased in a different direction, he could deprive a plaintiff of his rights by omitting service at the proper time. But no such dangers attend the mere issuance of the writ. The document speaks for itself, and if served by the proper officer can accomplish neither more nor less, whether issued by the clerk or a temporary substitute. The legislature would seem to have recognized these truths, in its omission of clerical officers from the general provisions.

The Circuit Court never acquired any jurisdiction over the person of the defendant, which could authorize either the interlocutory or the final judgment. The suit, as originally brought, was not for the possession of real estate, or to affect any title thereto. There was but one defendant, and he was served in another county. He was not before the court for any purpose, except that which he chose to announce in his

motion to quash the writ. It appears, however, that two efforts were made to subject him to judicial authority. One was by force of a "rule of court," to the following effect:

"Application to the court to raise any jurisdictional question, shall be deemed an appearance, and no further process shall be necessary to bring the party into court. But if the process to which objection is taken be defective, the party so applying may have a continuance, or time to answer, as to the court may seem just and equitable."

Unless it can be shown that the court had a legislative authority, this "rule" was void. Jurisdiction over a person can never be acquired, unless by a method which the law specifically provides, or by consent of the party himself. If the legal method has not been employed, and the party expressly refuses his consent, an assumption of jurisdiction by the court will be purely arbitrary. This so called rule not merely overrules—it undertakes to repeal the law as declared in numerous decisions rendered by this court. (*Smith vs. Rollins*, 25 Mo., 408.) The other effort was not less curious.

Until the eighth day of the term the action was a personal one only. The writ having been, for such a proceeding, served in the wrong county, there was in effect no service at all. An amended petition was then filed, which converted the personal into a real action; the effect whereof is claimed (by relation presumably) to make the service appear sufficient from the beginning. This, at least, is the logic of the positions taken here. Such devices, if sanctioned, would make our jurisprudence a mockery.

Even if the defendant were properly before the court for every purpose, there was no lawful authority for the final decree rendered at the return term. "Every suit that shall not be otherwise disposed of according to law, shall be continued at the term at which the defendant is bound to appear, until the next term thereafter, and at such second term every such suit shall be determined." (*Wagn. Stat.*, 1039, § 5.) This suit not being in a county having over forty thousand inhabitants, nor founded on a bond, bill or note for the direct payment of

Huff v. Shepard.

money or property, (Wagn. Stat., 1014, § 5) nor yet upon a judgment of any court of record or an open account, (Wagn. Stat., 1053, §§ 9, 10)—either of which events would have permitted it to be “otherwise disposed of”—the provision just quoted controlled it. (Dougherty vs. President, etc., 53 Mo., 579.)

We come now to consider the cause of action. The agreement which the court was asked to enforce, appears in the following words :

“Know all men by these presents, that we, Joseph Huff and Elihu H. Shepard, have this day agreed as follows, to-wit: The said Joseph Huff has bargained and sold unto the said Elihu H. Shepard, all his real estate in Ironton, Mo., situate east of the Presbyterian Church, including all the personal property and household furniture thereto belonging, excepting, however, the family clothing, books, papers, etc., which are strictly private, and one sewing machine, at and for the sum of twenty-five hundred dollars; the said Shepard to assume the amount owing to Iron county school fund, by the said Joseph Huff, and the balance of purchase money to be paid *on such terms as may be agreed on between said parties*. Given under our hands, etc.”

The Circuit Court undertook to compel performance of the final clause in this agreement, by rendering a judgment against the defendant for \$1,300 and interest. This was not enforcing the defendant's contract; for he never bound himself to any such cash liquidation without regard to time. It was enforcing a new agreement, made for him by the court and the plaintiff. So far as the defendant had bound himself at all, it was upon an express stipulation that the terms of payment should be only such as he might thereafter consent to in a further agreement. Time—being included in the terms—thus became of the essence of the contract.

Such an undertaking to settle terms at a future day, is beyond the reach of any decree for specific performance. The court cannot compel parties to agree. The remedy attempted would destroy the subject of treatment. In *Kemble vs. Kean*,

Linville, et al. v. Savage, et al.

(6 Sim., 333) the Vice Chancellor said: "Can a man be compelled to act at a theater by this court sending him to the fleet, where he cannot act at all?" So, in this proposition to compel a person to agree, the element of compulsion would annihilate in advance the thing it promised to create. For no contract can live in the law's atmosphere, unless born of voluntary choice in the parties.

The judgment must be reversed; and this court proceeding to make the only disposition of the subject which could be proper in the court below, dismisses the case. The other judges concur.

— o —

PHILLIP B. LINVILLE, *et al.*, Appellants, *vs.* SAMUEL SAVAGE, *et al.*, Respondents.

1. *Mortgages—Parol agreement as to priority of securities—Effect of on assignees—Vendor's lien, etc.*—Certain land was sold, and notes secured by mortgage given for the purchase money which was duly recorded. The purchaser afterwards sold the same tract at an advanced price and received notes for a sum equal to the original purchase money secured by mortgage and further notes for the advance price secured by a second mortgage of same date. Then, in order to relieve himself of all responsibility on his notes given for the original purchase money, his vendor surrendered said notes and discharged the mortgage given to secure them, and accepted the notes given by the second purchaser in their place, it being agreed that they should be substituted in lieu of the notes so surrendered, and also that they should be satisfied out of the property before those given to the first purchaser for the advance price. The last named notes matured first, and suit being brought against the first purchaser by a third party, to whom they were transferred upon said notes, and to foreclose the mortgage; *held*—1st—that the parol agreement for the substitution might be shown in evidence. It would not have the effect of modifying or changing the written instrument; 2nd—that the holder took the notes subject to that agreement, and to the equities created thereby, whether he had notice of the same or not. The doctrine of prior equities applicable to commercial paper would not govern in such a case, the question being as to the priority of securities. 3rd.—That the original purchaser would retain his vendor's lien notwithstanding the discharge of the mortgage. The vendor in receiving a mortgage to secure the purchase money does not lose his original lien by its merger in the mortgage.

Linville, et al. v. Savage, et al.

*Appeal from Shelby Circuit Court.**Glover & Shepley, with J. G. Blair, for Appellants.*

I. When the several debts passed into the hands of third persons, they should be paid in the order in which they respectively become due. (*Mitchell vs. Ladew*, 36 Mo., 526; *Mason vs. Barnard*, 36 Mo., 384; *Thompson vs. Field*, 38 Mo., 320; *Ellis vs. Lamme*, 42 Mo., 153; *Hunk vs. Erskine*, 45 Mo., 484; *Matthews vs. Switzer*, 46 Mo., 301.)

II. The alleged agreement between Alkire and Savage, that Martin's deed of trust should have precedence over the other was simply void. It could neither qualify, alter or modify the legal effect of the written instruments. (*Jones vs. Jeffries*, 17 Mo., 577; *Bunce vs. Beck*, 43 Mo., 266; *Murdock vs. Ganahl*, 47 Mo., 135; *Benson vs. Harrison*, 39 Mo., 303; *Massman vs. Holscher*, 49 Mo., 87; *Inge vs. Hance*, 29 Mo., 399; *Barton vs. Wilkins*, 1 Mo., 74; *Cockville vs. Kirkpatrick*, 9 Mo., 697; *Deitz vs. Mound City Mut. Fire & Life Ins. Co.*, 38 Mo., 85.)

Anderson & Boulware, for Respondents.

I. The assignment of the notes cannot vest the assignees with any higher rights or stronger equity in the security than the assignor himself had. (*Potter vs. McDowell*, 43 Mo., 97.)

II. An agreement made at the time by a mortgagee that one of two simultaneous mortgages shall have precedence over the other is binding upon said mortgagee. (*Gilman vs. Moody*, 43 N. H., 243; *Freeman vs. Schroeder*, 43 Barb., 620; *Washb. Real Pr.* [3rd Ed.], p. 111, § 10.)

And parol evidence is competent to show which of two simultaneous deeds was intended to take precedence.

III. An express lien does not operate to merge the implied lien of a vendor for the purchase price of land, when it would be inequitable for such lien to be lost. (*Morris vs. Pate*, 31 Mo., 317.)

IV. The doctrine recognized by this court, that where a deed of trust is given to secure notes maturing at different

times the proceeds of sale are to be applied to the payment of the notes in the order of their maturity, can have no application to this case. Here the question is one of preference between two different deeds. Moreover the two sets of notes were secured by two deeds instead of one, for the express purpose of giving precedence to one of them.

NAPRON, Judge, delivered the opinion of the court.

The petition in this case, which was filed in Oct., 1870, had for its object a judgment upon two notes given by Savage, one of the defendants, to Alkire, another defendant, and the foreclosure of a mortgage or deed of trust given by Savage to secure these notes. Martin was made a party defendant because he also held a mortgage or deed of trust on the same land, and Hatcher, the other defendant, was the trustee in both deeds.

A very elaborate and detailed statement of the facts in this case, about which there is scarcely any controversy, is contained in the finding of the court, which occupies twenty pages of the record—but for the purpose of this review of them here, it will only be necessary to give a summary history of them.

Martin, one of the defendants, owning a tract of land in Lewis County (where this suit was first brought) sold it to Alkire, another defendant, on the 1st of March, 1866, and made him a deed. The purchase money was \$10,500.00, \$1,000 of which was paid down and nine notes for the remainder, \$9,500.00, executed by Alkire to Martin, payable yearly from the 1st of March, 1865, to 1st March 1875, with interest at 8 per cent., amounting in the aggregate to \$13,460.00. To secure these notes, Alkire made a deed of trust, with Hatcher as trustee, and both deeds were duly recorded.

On the 17th May 1866, Alkire sold this same land to defendant, Savage, at an advance upon the price he agreed to pay Martin, of \$3,628, and gave Savage a deed, and took from Savage nine notes exactly corresponding in dates, amounts, rate of interest, etc., with those he had given to Martin; and to secure

their payment, Savage also executed a deed of trust, making Hatcher trustee. This deed was dated May 17, 1866, was acknowledged the 27th May, 1866, and was recorded Aug. 30th, 1866. At the same time Savage executed four other notes to Alkire, for the advance price which he had agreed to give Alkire, and made also another deed of trust to Hatcher to secure these four notes. These four notes fell due, according to their tenor, before the nine notes hereinbefore referred to.

The object of this transaction between Alkire and Savage, as the court finds, and as is indeed apparent on its face, was to relieve Alkire of further responsibility to Martin, and substitute Savage's notes for his, and Savage's deed of trust; to secure them in place of the notes and deed of trust which Alkire had previously, on the 1st March, given to Martin. The nine notes represented the original purchase money and the four notes the advance on this.

The second deed of Savage to Alkire bears the same date with the first (17 May 1866). It was acknowledged on that day and recorded Oct. 20, 1866.

This arrangement was satisfactory to Martin, who was informed of the second deed of trust to secure the four notes for the advance price; but being also informed by Alkire and Savage, that the first deed was entitled to priority and that the nine notes for the original purchase money would have to be paid before the four notes for the advance, he gave up to Alkire his nine notes, and entered a discharge of the mortgage or deed of trust to secure them on the record. This was done on the 30th August, 1866, the day on which the deed first named was recorded. Martin did not see the deed to secure the four notes; it was not recorded till Oct., 1866.

The first of the four notes of Savage (for the advance) was paid, and on the 19th of Oct., 1866, the day preceding the date of filing the deed of trust to secure them, the second and third of these four notes were assigned by Alkire to plaintiffs, who had no notice, except what the deeds and records furnished; and these two notes are the notes upon which the plaintiffs claim judgment and a decree of foreclosure.

Savage also paid off the first of the nine notes, which Alkire had transferred to Martin, and paid some money on the second previous to this suit. Two other notes of the nine were due and unpaid, at the date of the filing of this action.

The court, after a recital of the facts as above stated, ordered the trustee to sell the land described in both deeds of trust, and directed the proceeds, after paying expenses, to be applied, first, to the payment of the nine notes which had been substituted for the original purchase money, and then to the payment of plaintiffs' two notes. A personal judgment against Savage was rendered also in favor of plaintiffs, as well as Martin, for the amounts respectively due them.

The only question here, is as to the propriety of the decree, in giving a priority to the claims of Martin, over the claims of plaintiffs who insist on their rights to have their notes first paid, as being first due.

If this question was one between Martin and Alkire, from whom plaintiffs bought the notes, we suppose no argument or authority would be needed to justify the priority given to Martin in the decree. For, laying aside any consideration of the admissibility of the parol evidence, the transaction itself could lead to no other conclusion, than that Martin and Alkire, in substituting one deed of trust for the other, had no design that the one last received should be of less value than the first. No man in his senses, as we must suppose Martin to have been, would have given up a security upon his own land, for which he had not been paid, and upon which, aside from deeds of trust and notes, he had a lien for the unpaid purchase money, unless he supposed the security received in its place was equally efficacious with the one abandoned. And if the latter proved not to be so, it was simply a gross fraud, or an innocent mistake, from either of which a court of equity would relieve.

The testimony of Martin in regard to his understanding that the deed to secure the four notes was subsequent and subsidiary to the deed to secure the original purchase money, and that Alkire and Savage so represented it, which is ob-

Linville, et al. v. Savage, et al.

jected to as parol evidence to change or affect a written contract, is really not needed to satisfy a court or jury, that such was the understanding of Martin, and that such was the intent of Alkire. The correspondence of the nine notes given by Savage with the nine notes given by Alkire in all their details, could have originated in no other motive than a belief that the one set of notes would be exchanged for the other, and the security of the one exchanged for the security of the other, without affecting in any way, the value of these notes and securities to Martin. Alkire could have had no other object in view—if he was an honest man or a man of ordinary intelligence—and seems to have entertained no design of imposing on Martin. He, therefore, so represented the matter to Martin, and the proof of these representations is not obnoxious to the imputation of seeking by parol to modify or change the construction of a written instrument; but to show that one of two instruments, was understood by both parties to them to have a priority over the other. If this was not so, it was either a mistake of Alkire's or a fraud, and parol evidence was admissible to show either.

The retention by Alkire of the deed to secure his notes for the profit he had made in his sale to Savage seems to confirm the hypothesis that Alkire had no intention to deceive or defraud Martin. This deed was never put on the records till after Alkire's sale of the two notes to plaintiffs.

The only difficulty in the case arises from this sale of the notes to plaintiffs, who claim to be innocent purchasers, without notice of anything except what appeared on the records. The records showed the deed of Savage to secure the nine notes, and that was all upon the records at the time they purchased. But the day after they purchased the security, the deed to secure the two notes they purchased was filed for record. And this deed was executed on the same day with the deed to secure the nine notes, although the latter was duly recorded immediately after its execution, and the former was held by Alkire in his pocket, evidently with a view to give the deed to Martin a priority in accordance with his representations to Martin.

There is no doubt the plaintiffs, so far as the notes were concerned, were purchasers for value, without any notice of any equitable defense to these notes. As such they were unquestionably entitled to a personal judgment against the makers. The notes carried with them the security of the mortgage or deed of trust, which was executed on the same day with the mortgage to secure the original purchase money and had apparently no subjection to it in point of priority. In point of fact, however, this mortgage or deed of trust was intended by all the parties to it, to be subordinate to that deed which was executed to secure the purchase money. Whether it was so intended or not, a court of equity would see to the payment of the purchase money first. The vendor in receiving a mortgage to secure the purchase money is not understood to lose his original lien, by its merger in the mortgage. (*Moore vs. Pate*, 31 Mo., 315.)

The question then is, whether the plaintiffs, in buying these notes, which were secured by a mortgage, are not bound, with or without notice, to accept the security with all its infirmities. Their right to a personal judgment against the makers is indisputable, without regard to the equities between the makers and holders; but when they seek the enforcement of their claim under the mortgage, it is not clear that they occupy any better position than the person from whom they bought. One who seeks to enforce an equity, must take it subject to prior equities.

Savage had no title when he conveyed to Hatcher, except what he derived from Alkire; and Alkire had no title, except what he derived from Martin. The purchase money was a lien independent of these transactions. Therefore, we do not see how Martin lost his priority, although the purchasers from Savage did not appreciate properly the value of their security. They had full notice of the deed to secure Martin, as it was recorded before they bought. Their claim to have their security put upon the same footing, with that of Martin, is based on the assumption that the two deeds were contemporaneous, as they undoubtedly were, and that no priority

existed between them. That such priority did exist, so far as agreements could make them, is plain. But apart from all agreements, and considering such as not affecting the plaintiffs, such priority sprang from the very nature of the transaction, which was substantially to secure a vendor's lien which had never been extinguished.

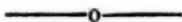
And the only question is, whether the plaintiffs, who bought these notes which carried with them an equitable lien, are to be affected by the character of the security, which the notes drew with them, or whether they have a right to enforce such security without regard to prior equities, assuming that they have no other knowledge than such as the record imparts.

The law governing mercantile paper has no application to this case. The plaintiffs under that law, could not be bound by any equities between the original payee and the maker, so far as these notes are concerned. But the deed of trust or mortgage to secure these notes was made no better or worse by a transfer to the plaintiffs. Martin, it will be observed, had never, during all these transactions, lost his lien for the original purchase money. He took no personal security from his vendee, other than the vendee himself, and no real security except what the law already gave him on his own land. We cannot say that Martin was guilty of such laches as would forfeit his rights in a court of equity. He had no concern with the four notes given by Savage to Alkire, nor with the security Alkire gave. He never was shown that security, nor was it put upon the records. He was informed that such security was given, but that the deed was subordinate to the one given to him. Whether this was so, or not, his lien for the purchase money remained. The transaction between Alkire and Savage concerning the four notes for the advance upon the purchase money, was a distinct and independent transaction in which Martin had no interest, upon the supposition that Alkire did not deceive him as to its character and effect. If Alkire did so deceive him, although he appears not to have done so intentionally, the result would be

that a court of equity would disregard his deed of trust, and allow Martin to fall back upon his original lien, which neither this deed nor Savage's notes had extinguished. Martin accepted Savage's notes in lieu of Alkire's, not as additional or better personal security, but simply as a substitution of one debtor for another; and the deed of trust from Savage was also accepted in lieu of the same deed already given to him by Alkire and supposed to be equally efficacious in protecting his rights as vendor. No new or independent security was taken.

Considering the decree of the Circuit Court, therefore, as substantially an enforcement of the vendor's lien for the purchase money, through the sale ordered to be made by the trustee, we think the court was right in requiring the notes for this purchase money to be paid.

We shall, therefore, affirm the decree; the other judges concur.



THE STATE OF MISSOURI, Appellant, *vs.* JOSEPH FISHER, Respondent.

1. *Indictment—Altering "Dunklin County Patent," etc.*—An indictment charging defendant with feloniously altering a "Dunklin County Patent" but not describing the instrument, nor alleging wherein it was altered, held bad on motion to quash.

Appeal from Dunklin Circuit Court.

M. W. Lawson, for Appellant.

I. The indictment gives a sufficient description of the instrument alleged to be forged. (Wagn. Stat., 1091, § 28.)

II. This section of our law is taken from, and is exactly the same as, the 5th section of 14 and 15 Vict. C. 100. (Arch. Cr. Pr. & Pl., 534.)

III. The main objection raised in the court below and sustained by the court, was that the indictment does not show in what particular the alleged instrument was forged or altered. That is not necessary. See a precedent and comment thereon in Arch. Cr. Pr. & Pl., 534-535.

IV. An alteration of any material part of a written instrument is a forgery of the whole and will support an indictment for that offense. (*Id.*, 535; Whart. Cr. Law, § 1421.)

SHERWOOD, Judge, delivered the opinion of the court.

An indictment charging: "That one Joseph Fisher, on the 12th day of May, A. D. 1874 at, etc., did then and there unlawfully and feloniously forge, and falsely alter a certain instrument of writing usually known as a Dunklin County Patent, which, said patent was numbered "ninety-one," and purported to be the act of Moses Farrar, president of the County Court of Dunklin County; by which said forging and falsely altering of said patent, a right and interest in certain real property was changed and affected, and by said patent, after it was so forged and falsely altered, purported to be conveyed and transferred to one James Marshfield of St. Louis County, Missouri; he, the said Joseph Fisher then and there, by said forging and falsely altering of said patent, intending feloniously to defraud some person or persons to these jurors unknown, contrary, etc.," was quashed on motion of defendant and our consideration will be directed to the propriety of this ruling.

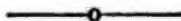
It will be at once perceived that the gravamen of the offense with which the defendant is charged, consists in the felonious alteration of a "Dunklin County Patent." But the indictment leaves to conjecture what the instrument was before its alteration and also in what that alteration consisted. It is obvious that such vagueness of statement could not apprise the defendant of the accusation he must prepare to meet and repel at the trial, nor could such trial, whether resulting in acquittal or conviction, if based on allegations so insufficient and indefinite, be plead in bar of further prosecution.

Campbell v. Wortman, et al.

And thus two of the great ends of criminal procedure which can only be attained through definiteness and certainty of statement, would, if this indictment were deemed sufficient, be defeated.

A point very similar to the one here discussed, was determined in accordance with the same view of the law as that above mentioned in the case of the State vs. Maupin decided at our last July Term, (57 Mo., 205).

Judgment affirmed; all the judges concur.



JAMES CAMPBELL, Respondent, vs. ALBERT N. WORTMAN, et al.,
Appellants.

1. *Swamp lands—Act Sept. 28, 1850, effect of—Neglect of officers.*—The act of Congress of Sept. 28, 1850, to enable the State of Arkansas and other States to reclaim the swamp lands within their limits, constituted a present grant vesting an absolute title in the State of Missouri to such lands, without issue of patent; (H. & St. J. R. R. vs. Smith, 41 Mo., 310; S. C., 9 Wall., 95; Clarkson vs. Buchanan, 53 Mo., 563,) and after the act took effect the power of disposal in the general government was gone. If its officers, by inadvertence, again sold and conveyed the land, the purchaser under them would take no title, because the government had no title to convey.

Appeal from Adair Circuit Court.

DeFrance & Halliburton, for Appellants.

I. The act of Sept. 28, 1850, was by its terms an absolute grant of all swamp lands, and if this land was actual swamp land, which fact is undisputed, so far as the evidence is concerned, then whether the defendants have title or not, the plaintiff cannot recover, having no legal title. (9 U. S. Stat. at Large, 519, § 1; Hann. & St. Joe. R. R. vs. Smith, 9 Wall., 95; Clarkson vs. Buchanan, 53 Mo., 563.)

Harrington & Cover, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The decision in this case rests entirely upon the question whether the Act of Congress 1850, to enable the State of Arkansas and other States, to re-claim the swamp lands within their limits conferred a present or vested grant of the lands to the States in which they were situated, or whether some further and ulterior action upon the part of the government officers was necessary to render the act effective.

The court refused to instruct the jury that if they believed from the evidence that the lands sued for were, on the 28th day of September, 1850, swamp or overflowed lands, and thereby rendered unfit for cultivation, then the act of Congress of that date, was a present absolute grant thereof to the State of Missouri, and they were by the act of the legislature of Missouri of 1851, conveyed to Adair County, and the plaintiff had no title.

From the record it appears that defendant's ancestor, from whom they derive title, was in possession of the land in controversy prior to 1853, and that the same was actual swamp land and was selected as such by the commissioner of swamp lands for Adair County in that year.

In the year 1855, under a preference given to him by the County Court, defendant's ancestor bought the land of the county as swamp land, and received a certificate of purchase therefor, and afterwards, in the same year, made full payment, but did not obtain his patent from the county till 1871.

In the year 1857, plaintiff's grantor entered the land at the United States land office at Milan, and in 1860, he received a patent from the general government. In 1873, plaintiff, who claims under this last patent, instituted this proceeding in ejectment to recover the premises. If the act of 1850, was a present grant, then it vested the fee in the State, and any subsequent sale, grant or patent by the government was a mere nullity.

The question here presented has been repeatedly before the courts.

In the case of the Hann. & St. Joe. R. R. vs. Smith, (41 Mo., 310,) it was decided that the act operated as a reservation on subsequent grants, and that in a suit by a government grantee, claiming under an after acquired title, it was competent to prove by parol testimony in defense, in an action of ejectment, that the land sued for was swamp and overflowed land, made thereby, unfit for cultivation, so as to bring it within the terms of the grant or reservation of the act of September 23, 1850, although the lists and plats to be made by the secretary of the Interior, provided for in the act, had not been made and transmitted to the governor, and no patents had issued.

This case was affirmed on appeal to the Supreme Court of the United States, and in the latter tribunal it was held, that the act concerning swamp and overflowed lands conferred a present vested right to such lands, though the subsequent identification of them was a duty imposed upon the secretary of the Interior. The court went further and declared, that although the act devolved the duty on the secretary of ascertaining the character of the lands, and furnishing the evidence to the State, yet the State would not lose the land, because that officer had neglected the performance of his duty. The right of the State did not depend on his action, but upon the act of Congress, and as the officer had no satisfactory evidence under his control to enable him to make out the lists, but was under the necessity of relying upon the personal observation of others, the same kind of testimony was competent, when the issue was made in a court of justice, and that it might be shown by parol that the land was swamp or overflowed. (Hann. & St. Joe. R. R. vs. Smith, 9 Wall., 95.)

In the case of Clarkson vs. Buchanan, (53 Mo., 563.) the same act of Congress was again before this court, and it was there held in accordance with the above authorities, that it constituted a present grant, vesting an absolute title to the swamp lands in the State of Missouri, without the issue of a patent.

Gatewood, et al. v. Hart.

The evidence in this case is undisputed. There is no question about the lands in this controversy being swamp or overflowed lands, and as such coming within the grant contained in the act of Congress. When the act took effect it vested the title to the lands in the State, and the power of disposal of the general government was gone. If its officers, by inadvertence, again sold and conveyed the land, the purchaser under them would take no title, because the government had no title to convey. The defendant's ancestor had paid for the land and received his certificate of purchase long before plaintiff's grantor made his entry at the land office.

The county at that time possessed the title, and when he obtained the patent he acquired all the rights of the county and his title was complete.

For these reasons the judgment of the Circuit Court must be reversed and the cause remanded; all the judges concurring.



WILLIAM L. GATEWOOD, *et al.*, Respondents, *vs.* SAMUEL B. HART, Appellant.

1. *Land and land titles—Conveyances—Record—Act of Feb. 2, 1847.*—The Act "to quiet vexatious land litigation," approved Feb. 2, 1847, was not designed to defeat a title regular in every particular, acquired in good faith and for a valuable consideration, but simply to make deeds which theretofore were valid between the parties, operate from and after the passage of the act as constructive notice, as though they had been correctly proved or acknowledged when recorded.

Appeal from Montgomery Circuit Court.

Stuart Carkener, for Appellant.

I. It is the settled law that a purchaser for value, without notice of a deed previously made but acknowledged before a justice of the peace of a county different from the one where the land lies, obtains the title as against such deed; also, that the record of such deed as to all purchasers prior to 1847, is

a nullity and imparts no notice. (Bishop vs. Schneider, 46 Mo., 472-479, *et seq.*; Stevens vs. Hampton, 46 Mo., 404; Ryan vs. Carr, 46 Mo., 483; Musick vs. Barney, 49 Mo., 458; Briggs vs. Henderson, 49 Mo., 531-536.)

II. The act of 2nd Feb. 1847 operates prospectively from its date, and was intended to settle, and not unsettle and overturn titles. (46 Mo., 492; 49 Mo., 441; Musick vs. Barney, 49 Mo., 458; Briggs vs. Henderson, 49 Mo., 531; Allen vs. Moss, 27 Mo., 359.)

Henderson & Shields, for Respondents.

I. The act of February 2nd, 1847, in relation to the effect of deeds recorded prior thereto, but improperly acknowledged, affects with notice all parties, or persons acquiring title thereafter absolutely; and such alienees cannot avoid the force of such statute and shield themselves behind want of notice to their vendor. (Sess. Acts 1847, p. 95, § 8; Wagn. Stat., 595, § 35; Allen vs. Moss, 27 Mo., 354-363; Bishop vs. Schneider, 49 Mo., 472; Ryan vs. Carr, 46 Mo., 483; Musick vs. Barney, 49 Mo., 458; Henderson vs. Briggs, 49 Mo., 531; Digman vs. McCullom, 47 Mo., 372; Lemay vs. Poupenez, 35 Mo., 74-6.)

II. Unless it is affirmatively shown that alienees have acquired by *bona fide* purchase for a valuable consideration, they cannot invoke the protection of the equitable rule of want of notice to their vendor. (1 Sto. Eq., § 40, *et seq.* and note; Bishop vs. Schneider, 46 Mo., 472; Aubuchon vs. Bender, 44 Mo., 560; Briggs vs. Henderson, 49 Mo., 531-6.)

SHERWOOD, Judge, delivered the opinion of the court.

Action of ejectment for the west half of the north-east quarter of section 14, in township 50, of range 6 west, situate in Montgomery County. The answer admitted possession of the land sued for, but denied the other allegations of the petition.

The cause was tried on the following agreed statement of facts: "That one Isaac V. Herrick was the patentee of the land in controversy, and in March, 1837, conveyed the land situ-

ated in Montgomery County, Missouri, along with other lands situated in Ralls, Audrain and Pike Counties, to one J. D. Fyler, by a deed acknowledged before a justice of the peace of Pike County, Missouri, and that said deed was copied on the record of deeds of Montgomery County, Missouri, prior to April, 1839; that at the April Term, 1839, of the Circuit Court of Montgomery Co., Mo., the land in controversy was sold by the sheriff of said Montgomery County, as the land of said Herrick, under a judgment rendered in an attachment suit brought against said Isaac V. Herrick, the patentee of the land; and at said sale in April, 1839, one N. G. Wilcox bought said land for a valuable consideration then paid, and received a sheriff's deed therefor in due form, which was at once placed on the record of deeds; that at the time of said purchase, said Wilcox had no actual notice of said deed from Herrick to Fyler, or of the record of the same; that said Wilcox conveyed said land, in 1859, to one W. B. Beshears, under whom the defendant claims to be the owner of the premises, and plaintiffs claim under said deed from Herrick to Fyler, acknowledged before a justice of the peace of Pike County as aforesaid, in March, 1837."

This case hinges upon the proper construction to be given to § 8 of "an act to quiet vexatious land litigation," approved February 2, 1847. And it may be remarked in the outset, that the court below tried this cause under a total misconception as to the force, effect, and operation of the section referred to, which is as follows:

"The records heretofore made by the recorder of the proper county, by copying from any deed of conveyance, deed of trust, mortgage, will or copy of a will, that has neither been proven or acknowledged, or which has been proven or acknowledged, but not according to the law in force at the time the same was done, shall, from and after the passage of this act, impart notice to all persons of the contents of such instruments, and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice thereof."

This section, as the caption, as well as the whole scope and bearing of the act of which it forms a part, shows with conclusive clearness, was not designed to *divest*, but to *confirm* titles; not to defeat a title regular in every particular, acquired in good faith and for a valuable consideration, but simply to make the record of an instrument, already good as between the parties thereto, operate, "*from and after the passage of this act*," as constructive notice, to the same extent as though it had been correctly proven or acknowledged, when put to record, and thus prevent an unscrupulous grantor or some "prowling assignee" from taking advantage of mere technical defects; and at no time has this court, in construing this section, held views at all at variance with this idea. (Bishop vs. Schneider, 46 Mo., 472; Ryan vs. Carr, *Id.*, 483; Allen vs. Moss, 27 Mo., 354.)

But the court below went further than this, holding "that although Wilcox, in 1839, bought the land in controversy, under an execution against Herrick, for a valuable consideration, and received a deed therefor and placed the same on record at once, and that he so bought without any notice of the existence of the prior deed from Herrick to Fyler, acknowledged before a justice of the peace of Pike County, Missouri; and although said Wilcox could hold said land as against said Fyler or those claiming under him, yet, as Wilcox conveyed said land to Beshears in 1859, and after the act of the second day of February, 1847, was passed, making the record of such deed from Herrick to Fyler constructive notice to subsequent purchasers—and as defendant claims by deed from Beshears made since the deed of his (Beshear's) deed—both Beshears and defendant are in law purchasers with constructive notice of the record of said Fyler's deed, and take subject to the same, and cannot protect themselves as purchasers from Wilcox."

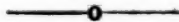
In other words, the astounding doctrine is gravely announced that, up to the second day of February, 1847, Wilcox had a perfect and indefeasible title to the land in controversy, and could convey the same as freely as any other owner in

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfroe.

fee; but *after* that period and in consequence of the operation of that statute, although his *title* remained as perfect as ever, yet the *jus disponendi*, the natural and inseparable incident of every fee, was utterly and irrevocably gone.

The legislature never intended by the act of 1847, to perpetrate such a gross injustice, coupled with such a palpable absurdity; and even had they in express terms so declared, the enactment of such a law would only have proved a *sheer legislative abortion*.

The judgment is reversed, and as it is evident that a new trial could be of no avail to the plaintiffs, their petition will be dismissed; all the judges concur.



CAPE GIRARDEAU & BLOOMFIELD MACADAMIZED AND GRAVEL ROAD Co., Respondent, *vs.* ANDREW J. RENFROE, Appellant.

1. *Conveyances—Validity—Record.*—A deed of land not recorded in the county where the land lies, is good between the parties thereto, and as to all others except purchasers without notice, for value.
2. *Condemnation of land—Road—Use—Title.*—An act of the legislature, giving a corporation the right to locate its road upon certain land, does not convey title to the land itself, so as to enable it to convert the lands which still belonged to individuals subject to the easement of the road, to entirely different purposes. Before the corporation can acquire the title, it must procure the condemnation of the land as provided by law.
3. *Estoppel depends upon facts—Not a matter of law.*—The question of estoppel depends upon facts, and estoppel is not to be presumed as a matter of law until the facts are found.
4. *Ejectment—Plaintiff must depend upon the strength of his own title.*—An instruction in an ejectment suit, that if defendant wrongfully entered upon the premises plaintiff must recover, is erroneous, as it makes the question of plaintiff's right depend only on the weakness of the defendant's title.
5. *Practice, civil—Instructions, conflicting—Trial by court.*—Although an instruction given for one party may be erroneous, and may seem to be contradicted by one given for the other, yet when the case is tried by the court, and the two instructions together correctly declare the law, the error will not be ground for a reversal.

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfro.

6. *Ejectment—Damages, measure of.*—The measure of damages for the detention of a building, is not the amount plaintiff may have expended to provide another building in its place; it is the rents and profits down to the time of assessing the same.

Appeal from Cape Girardeau Court of Common Pleas.

Houck & Ranney, for Appellant.

Lewis Brown, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This was an action of ejectment to recover the possession of a house and a parcel of land named in the petition.

The petition was as follows, to-wit: "Plaintiff states that by an act of the General Assembly, entitled, 'An act to incorporate the Cape Girardeau and Bloomfield Macadamized and Gravel road Company,' approved Oct. 25th, 1857, plaintiff was duly incorporated. Plaintiff states, that on the 1st day of July, 1873, they were legally entitled to the possession of a certain building known as the Allenville toll house, situated in said county, at Allenville, and the ground on which the same stands, and being so entitled to the possession thereof, afterwards, to-wit: on the 2d day of July, 1873, this defendant unlawfully and wrongfully entered thereon, and wrongfully and unjustly detains plaintiff from the possession thereof, to plaintiff's damage in the sum of five hundred dollars. Plaintiff states that the monthly rents and profits of said realty are reasonably worth twenty-five dollars per month. Plaintiff demands judgment for the restitution of said premises, and for five hundred dollars for their damages, so as aforesaid had and sustained, as well as for twenty five dollars per month, monthly rents and profits."

The answer was a denial of the facts stated in the petition. A trial was had by the court, a jury having been waived by the parties.

On the trial the evidence introduced by the plaintiff tended to prove that those under whom the defendant claimed title to the premises in controversy, were, in the year 1854, in possession of and claiming a tract of land adjoining a river or

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfro.

stream of water, called White Water, which tract of land included the parcel of land in controversy; that in the year 1854, the County Court of Cape Girardeau county established and opened a county road through said tract of land, so possessed and claimed by those under whom the defendant claims title, and constructed a bridge across or over said stream of water, at or near the place where the toll house in controversy was afterwards erected; that the county road so established was forty feet wide. The evidence also tended to show that the land upon which the toll house was afterwards erected was included in the right of way occupied by said county road or adjoining thereto; that shortly after this county road was opened and the bridge erected, the bridge was washed away by high waters and wholly destroyed; that after the destruction of the bridge the county road ceased to be used as a public highway, until about the year 1862, when a temporary bridge was erected upon the same abutments erected for the original bridge, by the military authorities; after which the county road was again traveled and used as a public highway for a considerable time; that in the year 1857, the General Assembly of the State of Mo. passed an act incorporating the plaintiff; that said act of incorporation adopted a previous act of the General Assembly, which had been enacted in the year 1851, incorporating a similar company, as a part of the act incorporating plaintiff; that by said act plaintiff was authorized to construct an artificial road from the city of Cape Girardeau in Cape Girardeau county, to the town of Bloomfield in Stoddard county. It is provided by the tenth section of said act of 1851, that the road to be constructed by plaintiff under its charter should be opened and kept free from all obstructions at least thirty feet wide, of which at least sixteen feet should be artificially constructed of timber, plank, stone, gravel or other hard material, so that the same should form a hard, smooth and even surface, etc.

By the eleventh section of the act the company was authorized to receive by deed, gift, purchase or other convey-

ance, a strip of land over which to construct its road, not exceeding one hundred nor less than forty feet in width. It was further provided, that if the company was not able to otherwise obtain the land for the road bed, land might be condemned to the use of the company for said purpose, in a manner pointed out in the statute.

The 12th section of the charter of plaintiff provided as follows: "It shall be lawful for said company to own in fee simple or otherwise, along the line of said road, or at any termination of the same, pieces and parcels of land for the purpose of procuring timber and other materials from the same for the use of said road, and for erecting thereon toll houses and for other purposes; and said company may at any time sell such tracts or parcels of land, or any part thereof, executing to the purchaser or purchasers a conveyance in manner prescribed by law regulating conveyance by corporations."

It is also further provided by said act, that if the necessary materials cannot be otherwise had for the construction of the road, the company may enter upon adjoining lands and take the necessary materials by paying therefor in a manner provided for in the act, etc.

The evidence produced by plaintiff tended to further prove that the plaintiff surveyed its road in the year 1857 or 1858, but that it did not construct its road and occupy the same at the point where the toll house was erected, or within several miles thereof, until the year 1866, at which time the road was constructed on the line and route of the county road before spoken of, and a new bridge constructed on the same abutments erected by the county for the bridge which had before been washed away; at which time (in 1866) the plaintiff erected the toll house in controversy, which was constructed within about thirty feet of the centre of the artificial road constructed by plaintiff, and near the bridge; that the plaintiff only claimed to locate its road forty feet wide; that the defendant knew of the erection of the toll house at the time it was erected; that the house had been occupied for

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfroe.

the purpose of a toll house by plaintiff, and that the defendant entered into the possession of the toll house without the consent of plaintiff, on the 15th of July, 1873, claimed title to the same, and withheld the possession of the house from plaintiff at the time suit was commenced. There was also some evidence given to show the damage done to plaintiff by the entry of defendant, and the value of the monthly rents of the house.

The defendant, on his part, offered in evidence a deed from Y. M. Powell to Michael Rodney, dated the 10th day of January 1842, which purported to convey a tract of land to said Rodney, which included the land on which the toll house in controversy stood, as well as that part of plaintiff's road adjacent thereto. This deed was objected to by the plaintiff, because it was acknowledged and recorded in Stoddard county and not in Cape Girardeau county, and could therefore impart no notice to plaintiff, and because defendant was estopped, he and his predecessors having permitted the right of way to be used for a county road.

These objections were overruled, and the deed read in evidence, to which the plaintiff excepted. The defendant then read in evidence several deeds, through all of which a title to said land was conveyed or purported to be conveyed and vested in the defendant. These deeds were each objected to as they were introduced, on the same ground of estoppel urged to the deed from Powell to Rodney. The objections were severally overruled and exceptions taken.

The defendant then introduced evidence tending to prove that he and those under whom he claims to derive title had been in possession of said lands for from twenty-five to thirty years before the commencement of the suit, claiming the same; and that the toll house was not erected or occupied until the year 1866, and that the house was erected with the knowledge of defendant and his grantors. The foregoing was substantially all the evidence in the case.

At the close of the evidence the court, at the request of the plaintiff, declared the law to be as follows: 1st. "The

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfroe.

jury is instructed that if they believe from the evidence, that the defendant on the 2d day of July, 1873, or since, unlawfully and wrongfully entered and took possession of the house known as the toll house, as described in the petition, the jury will find for the plaintiff."

3d. "The jury is instructed if they believe from the evidence that the County Court of Cape Girardeau county appointed commissioners to view and locate a public road from the city of Cape Girardeau to Bloomfield; and if they further believe from the evidence that such commissioners did view and locate said road, and did make a report to said court, and that said report was by said court approved; then the route so selected and approved became and was a public road of the county, and the plaintiff had, with the consent of the County Court, the legal right to take and occupy said road or any part thereof, for the use and purpose of constructing their road."

6th. "The jury is instructed that if they find for the plaintiff, they will, from the evidence, assess the damages plaintiff may have sustained in any sum not exceeding five hundred dollars. The jury will also from the evidence find the value of the monthly rents and profits of the premises in question; and if the jury believe from the evidence, that plaintiff, by the alleged wrongful and illegal act of defendant, was obliged to rent and fit up for a toll house other premises in the place of the one so taken, the measure of damages will be the reasonable amount plaintiff was obliged to pay for fitting up, and rent of the premises plaintiff was so obliged to rent and fit up."

To the giving of these instructions, or declarations of law, the defendant at the time objected and excepted.

The court at the request of the defendant, declared the law to be as follows, to-wit: 1st. "The court finds the law to be, that before the plaintiff can recover in this case, it must show title to the premises. 2nd. And further, that title may be acquired by an open and continuous possession, adverse and hostile to all persons whomsoever, of the defendant and those

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfroe.

under whom the defendant claims, for more than ten years previous to the institution of this suit. 3rd. And further, that the fact that the county may at one time have opened a road over the premises, cannot avail the plaintiff until some privity is shown to exist between the county and the company. 4th. And further, that although at one time a road may have existed, yet if the court is satisfied that said road was afterwards abandoned for a number of years by the public, the property reverted to the original owner, even if it should appear that the title to the premises was legally and properly acquired by the county; and a mere temporary abandonment, by reason of the washing away of a bridge, is not such an abandonment as would cause the property to revert."

And the court refused to declare the law in connection with the foregoing, as follows: "And further that, although the county may have acquired the title to the premises legally, yet that the county could not convey the said road to a private corporation."

The defendant excepted to the action of the court in refusing this last declaration of law. The court then found for the plaintiff, and rendered a judgment in its favor for the possession of the premises, and for the sum of seventy two dollars and fifty cents damages, and for rents and profits, etc.

The defendant then filed a motion for a new trial, which being overruled, he appealed to this court.

Previous to an examination of the main and most material points involved in this case, it will not be amiss to briefly refer to the objections made by plaintiff to the admission of the deed from Powell to Rodney, read in evidence by the defendant. The objections were: 1st. That the deed had not been recorded in Cape Girardeau county; and 2d. That the defendant, by his acquiescence in the use of the strip of land by the county as a county road, was estopped from denying the right of the county and those claiming under the county, to the land included in the road.

As to the first of these objections it is sufficient to say, that the deed was good as between the parties thereto, and as to all others except such as had become purchasers of the land for value, without notice of the conveyance or title of the defendant; and there is no pretense made in this case that the plaintiff is a purchaser of the land for value, or without notice of the defendant's title, whatever that title may be.

The second objection to the deed is the same objection which was made to all of the defendant's evidence. The objection assumes that the county of Cape Girardeau had acquired a title to the land in controversy by estoppel, and that the plaintiff, as the successor of the county, acquired the rights of the county and could insist on the estoppel. It seems to me that this assumption or objection is founded on a misapprehension of both the facts and the law. The plaintiff in this case, if it has any right in the road bed of its road, did not derive that right from Cape Girardeau county; but from the act of the legislature creating its corporate existence. The plaintiff was authorized by that act to locate its road over and upon the route of the county road; but neither the county nor the State attempted to convey any right to the land on which the road was located to the plaintiff; and therefore the plaintiff could not avail itself of any privileges which had been conceded to the county, to justify it in converting the land belonging to individuals (only subject to the easement of a county road) to entirely different purposes. The plaintiff had a right to locate its road on the county road, but in doing so, in order to acquire a title to the land, it should have proceeded under its charter to appropriate the land necessary for its legitimate purposes. And, moreover, this question of estoppel depended upon the facts of the case, and could not be assumed as a matter of law, until the facts were found by the court.

The second objection urged to the action of the court, grows out of the giving and refusing of declarations of law asked for by the respective parties. It is difficult to see from the declarations of law made and refused by the court, upon

Cape Girardeau & Bloomfield Macadamized and Gravel Road Co. v. Renfroe.

what theory or principle the case was decided by the trial court. The first declaration of law or instruction given by the court was, when considered alone, clearly improper. By that instruction it is asserted by the court, that if the defendant wrongfully entered into the possession of the premises in controversy, the plaintiff must recover. This wholly ignores the fact as to whether the plaintiff has any title to the premises or not. But by the first declaration of law given on the part of the defendant, it is asserted that the plaintiff cannot recover until it shows title to the premises in itself. These two declarations of law would seem to conflict, and if the trial had been before a jury, might have had a tendency to mislead; but as this case was tried by the court, no such result is to be apprehended, and we think that the two instructions taken and construed together under such circumstances, were not improper or erroneous.

The declaration of law numbered three, given by the court for the plaintiff, assumes that if the County Court had located a road over the defendant's land, the plaintiff, under its charter, had a right, with the consent of the County Court, to take, use and occupy said road for the uses and purposes of its road. And the court refused to declare the law as asked for by the defendant, to the effect, "that the fact that the county may at one time have opened a road over the premises, cannot avail the plaintiff until some privity is shown to exist between the county and the company."

It would seem from the giving of the first of these declarations of law and refusing the last, by the court, that the court entertained the idea that the plaintiff could, by virtue of the power given it in its charter to locate and construct its road upon and over any county road, locate and construct its road over and upon any county road regardless of the rights of the owners of the land through which the road was located, or in other words, that the act of the legislature in such cases had the effect to transfer the title to the land, upon which the county road had been located, to the plaintiff.

This, I think, is a misconstruction of the law. The legislature only intended to permit the plaintiff to locate its road upon the same ground which had been occupied by the county road, but in doing so it was the duty of plaintiff to have the damage done to the owners of land by the location of its road thereon assessed, and see that the same was paid in conformity to the provisions inserted in its charter provided for that purpose. Until this was done, the plaintiff could acquire no title to the land upon which its road was located. There is not a particle of evidence in this case to show that either the county or the plaintiff had ever acquired any title to the land upon which the road was located, and even if it were admitted that the county had condemned the land to the use of a county road, it would make no difference. An owner of land might well consent to the appropriation of a strip of his land for the use of a county road, over which he and his neighbors could pass and travel at pleasure, and still object to the location of a road thereon over which he had no control, and could not travel without paying a private corporation for the use thereof. The legislature never intended to authorize the plaintiff to so appropriate the land of individuals without paying a just compensation therefor. If the legislature had so intended that the act should be so construed, the act would have been violative of the constitution of this State and void. (*Williams vs. Natural Bridge, &c.*, 21 Mo., 580; *Lackland vs. North Mo. R. R. Co.*, 31 Mo., 180; *People vs. Gray*, 25 Wend, 465; *Dillon Mun. Corp.*, § 513; *Trustees, &c. vs. Auburn & R. R. Co.*, 3 Hill, 567.)

It is however argued by the plaintiff, that the defendant stood by and saw the appropriation of the land for road purposes, and made no objection, and that defendant knew when the toll house was erected, and did not forbid its erection; and that therefore he is estopped from setting up any title to the property as against plaintiff. It has already been stated that it makes no difference whether the defendant consented to the easement over his land created by a county road, the title to the land would still remain in him, only subject to the easement.

•

As to the knowledge that defendant had of the erection of the toll house by the plaintiff, the evidence shows that the defendant knew at the time that the plaintiff erected the toll house of its erection; but the evidence strongly tends to prove that this house was not erected on the land appropriated for the road. It is shown that the plaintiff only claimed that its road was located forty feet wide, and the toll house is shown to be thirty feet from the center of the plaintiff's road, and it will be seen from the 13th section of plaintiff's charter, that it had no power to appropriate land upon which to erect a toll house, without the consent of the owner. It is authorized by the 12th section of its charter to own land for such a purpose, but it is left to the ordinary means of acquiring such property that is open to individuals.

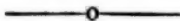
It is true that it has been held by this court, that where an individual is proceeding under the law to have damages assessed for the right of way over his land for the use of the road bed of a railroad, and stands by and sees the road constructed and put in operation, such conduct amounts to a license to the railroad company to occupy the land, and that after large sums of money have been expended in the construction of the road and putting it in operation, the owner of the land cannot abandon his claim for damages, and bring ejectment to recover possession of the road bed; that the license thus given cannot be so revoked as to turn the road company into a trespasser; but that such a party has other remedies to which he may resort for the enforcement of his rights. (*Provolt vs. The Chicago, Rock Island and Pacific R. R. Co.*, 57 Mo., 256.)

The present case does not seem to come within the rule laid down in that case. No such license was pleaded or relied on. The evidence only shows that the defendant knew of the erection of the house. There is no evidence that even tends to show that the defendant knew that the toll house was erected outside of the strip occupied as a road bed, by the plaintiff, as the evidence strongly tends to prove; but this is a question of fact to be tried with the other facts upon

the re-trial of the case, and may or may not become material to the rights of the parties.

The last point necessary to be noticed in this case is as to the measure of damages fixed by the court. In the 6th declaration of law as given by the court, on the part of the plaintiff, it is declared that the measure of damages to be recovered by the plaintiff, if the finding is in his favor, "will be the reasonable amount plaintiff was obliged to pay for fitting up and rent of premises plaintiff was obliged to rent and fit up." This rule of damages is clearly wrong. The damages as fixed by our statute in such cases are, where no waste is shown, the rents and profits down to the time of assessing the same, or to the time of the expiration of plaintiff's title, etc. (Wagn. Stat., 1870, p. 560, § 13; Cutter vs. Waddingham, 33 Mo., 269.)

Because, from the declaration of law given, it appears that the court tried the case on a wrong theory as to the law, and also improperly declared the rule of damages in such cases, the judgment will be reversed and the cause remanded; the other judges concur.



**TOWNSHIP BOARD of EDUCATION of Township 36, Range 2 East,
Plaintiff in Error, vs. FRANK K. BOYD, et al., Justices of
Washington County Court, Defendants in Error.**

1. *County Court—Agency as to matters of county and State—Township school fund—Remedy for misappropriations.*—The County Court is a trustee for the care and management of the township school funds. In this capacity it may, under certain circumstances, pay out money for which the township fund is manifestly liable, in order to avoid the expense of litigation. But if it err in so doing, the case is one of misappropriation by a trustee, for which the law has provided sufficient remedies, other than mandamus.
2. *Courts, County—Agency for State—Misappropriation—Responsibility.*—The County Court is also agent or trustee of the State for certain purposes in the general affairs of the county. The two agencies are distinct and independent, and there is no propriety in holding one agency, or the principal therein, responsible for a misappropriation committed in discharging the functions of the other.

Township Board of Education, etc. v. Boyd, et al.

3. *School funds—Misappropriation—Responsibility of county.*—If township school money be wrongfully paid out by the County Court, there does not arise any claim for re-imbursement out of the county treasury.
4. *Court, County, not a corporation—Misappropriation of school funds—Responsibility—Mandamus.*—A County Court is not a corporation capable of incurring a liability for misappropriation. Nor is mandamus admissible for enforcing a money demand founded upon alleged misappropriation of township school funds.

Error to Washington Circuit Court.

Pipkin, for Plaintiff in Error.

I. The duty of the County Court to pay over township school funds into the county treasury is ministerial, devolving upon them by operation of law; and imperative, and no element of discretion can enter into its performance, and mandamus is a proper remedy. (High Mand., § 230, p. 177; *Butler vs. Chariton County Court*, 13 Mo., 112; *Veal vs. Chariton County Court*, 15 Mo., 412; *Marion Co. vs. Moffet*, adm'r, 15 Mo., 604; *Ray County vs. Bently*, 49 Mo., 236; *People vs. Corp. of Brooklyn*, 1 Wend., 318.) And this is true, notwithstanding the existence of other remedies. (High Mand., § 17, p. 19; *Etheridge vs. Hall*, 7 Port., 47; *In re Trustees of Williamsburg*, 1 Barb., 34; *LaGrange vs. State Treasurer*, 24 Mich., 468.)

Reynolds & Relfe, for Defendants in Error.

I. Mandamus cannot be used to compel an inferior court to render up a particular judgment. It is not the appropriate remedy. (State, *ex rel.* *Sparks vs. Wilson*, 49 Mo., 146; *Trainer vs. Porter*, 45 Mo., 336, and authorities; High Extra. Leg. Rem., § 149.)

LEWIS, Judge, delivered the opinion of the court.

In 1866, Robert N. and William C. Martin became purchasers, in the usual manner, of the school section in township 36, range 2, east, giving their note with personal security to Washington County, for the use of the inhabitants of the township. In May, 1868, the note remaining unpaid, the

County Court required additional security, which was not given. A second order being made, also without effect, the court directed suit upon the note with an application for injunction against the makers to prevent their committing waste upon the land. The injunction bond was executed by F. K. Boyd and J. B. Johnson, two of the justices of the County Court, with other parties. Upon dissolution of the injunction, the Martins obtained a judgment for damages against the obligors, in the sum of \$563.08, including costs. This judgment being paid and satisfied by Justice Boyd, the County Court subsequently, by order on the county treasurer, re-imbursed him out of the funds pertaining to the school township. The relators, constituting the board of education, thereupon demanded of the court an order directing the treasurer to re-imburse to their township out of the county treasury, the sum so paid to Boyd. The court refused to make such an order, and this proceeding by mandamus was instituted to compel it. The defendant's return upon the alternative writ set out substantially the above facts, and the relators filed a motion to strike out the return for insufficiency in the facts stated, and for a peremptory mandamus. The court below overruled the motion, and, in the same entry, denied the prayer for mandamus. The relators insist here upon their right to the writ.

The defendants in error call our attention to several imperfections in the bill of exceptions, some of which embody at least a departure from wholesome precedent. But, as our views upon the merits of the relator's application may more effectually prevent further litigation on the subject, it seems best to avoid disposing of the case upon purely technical grounds.

The County Court was a trustee for the "care and management" of the school fund of the township. In this capacity, and in the exercise—for aught that appears to the contrary—of its soundest judgment and discretion, it instituted certain injunction proceedings for the protection of the fund. The law required personal security for the purpose, which

was given. A judgment against the surety following, which judgment he was bound to pay, and did pay, it would be strange if the law should refuse to indemnify him from the interest which his suretyship had so served at a sacrifice. We are not called upon to decide that Boyd could have sued and recovered his money back from the township fund. But it is sufficient to perceive that the County Court may well have believed so, and that, as guardian of the fund, its duty was to avoid the expense of useless litigation by paying the demand without it. If the court did wrong in this, there was, at the utmost, only a case of misappropriation by a trustee.

The County Court was, at the same time, a trustee or agent of the State for certain well defined purposes, in the affairs of Washington County. The two charges it held were as distinct and separable as two agencies of different mercantile firms can be held in one man. That this controlling fact appears to have escaped attention, is not a little remarkable, after the clear expositions by this court, in several cases, of the relations held by the County Courts to the counties and the school townships respectively. (*Reardon vs. St. Louis Co.*, 36 Mo., 555; *Ray County vs. Bently*, 49 Mo., 236.)

The court, in its management of the township fund, does not represent the county, nor has the county, as such, any voice, right, or responsibility in the matter. To hold the county answerable from its treasury for a misappropriation by the township's trustee, because the county's financial affairs happen to be managed by the same party, would be anomalous, to say the least. As well might an insurance company be held liable upon a risk it had never taken, on the ground that its agent was also agent of another company which had issued the policy.

These considerations, even if they accomplish nothing more, may serve to show that the relators have mistaken their remedy; which is as much as this opinion need undertake to settle. They show that, if the relators have any right which ought to be enforced, it is in the shape of a common law demand against somebody for a misappropriation of their money

Whittemore, et al. v. Obear, et al.

by the party having it in lawful charge for specific purposes. It cannot be a demand against the County Court; for that is not a corporation capable of incurring such a liability. If it is one against Washington County or against the justices personally, the law provides ample means for its enforcement, of which mandamus is not one. Nor is the alleged claim of relators to a re-imbursement, from the county treasury, a clear and unquestionable one, which the law has specifically defined, or which has been determined by an adjudication. It is at least open to grave doubts, which the unreasoning procedure by mandamus is unfitted to solve.

Because the remedy sought was not applicable to the case presented, the judgment below is affirmed, with the concurrence of the other judges.

—o—

EDWARD A. WHITTEMORE, *et al.*, Respondents, *vs.* EPHRIAM G. OBEAR, *et al.*, Appellants.

1. *Bills and notes—Innocent indorsees—Validity—Misrepresentations.*—Negotiable notes or indorsements in the hands of indorsees, though made simply for the accommodation of the original debtor, could be enforced against such makers or indorsers, although procured by misrepresentations made by the debtor to such makers or indorsers, if the indorsees or holders were not privy to the misrepresentations or frauds or unfulfilled promises of the debtor.
2. *Bills and notes—Validity—Surety—Agent, fraud or misrepresentations of.*—If a surety on a negotiable instrument makes the principal his agent, and the agent is only authorized to deliver it on certain conditions, not complied with by the agent, the surety cannot defend on the ground of frauds or misrepresentations made by his agent.
3. *Composition—Signature of all creditors—Waiver—Surety—Liability.*—A composition agreement between creditors and their debtor and his surety provided that the surety should indorse certain notes of the debtor, provided that all creditors to amounts exceeding \$200.00 should sign. *Held*, that it was the duty of the surety to see to it that all such creditors had signed the agreement, and that his indorsement of the notes, as to a creditor who was ignorant of any failure in the fulfillment of the condition, or its procurement by fraud, was a waiver of that condition, and that he could not avail himself of such failure or fraud against such creditor; and even if the creditor was aware of such failure or fraud, and chose to waive the objection, it did not lie in the mouth of the surety to set it up as a defense.

Appeal from St. Louis Circuit Court.

M. L. Gray with John M. Holmes, for Appellants.

I. The contract was joint, and all creditors are affected by the frauds of the others. The receipt of a cash bonus by some of the creditors was a fraud which avoided the whole agreement. (Doughty vs. Savage, 28 Conn., 146; 42 Mo., 403; 1 Sto. Eq., 10 Ed., 324, 378, 379.) Although plaintiffs themselves received no bonus, still the fraudulent conduct of other creditors in so doing, gave plaintiffs the power to rescind the whole agreement; *a fortiori* if plaintiffs could the indorser could. (Pendlebury vs. Walker, 4 Younge & Collin, 440; Sullivan vs. Collier White Lead Co., 42 Mo., 397.) The refusal of some of the creditors having claims of over two hundred dollars to sign said agreement, was such a breach thereof as avoided it *in toto*. (Forsyth Comp., p. 61 and following; Spooner vs. Whiston, 8 B. Mon., 580; Johnson vs. Baker, 4 B. & Ald., 440; Enderby vs. Corder, 2 C. & P., 203; Doughty vs. Savage, 28 Conn., 146.) The validity of the indorsement depends on the validity of the agreement, and that being void, the indorsement is void.

II. Defendants complain of the instruction No. 2, given by the court, for two reasons: 1st. The court erred in inserting the clause requiring defendants to prove that plaintiffs were apprised, at or before the time they signed the agreement, that defendants had agreed to indorse the twelve months notes, and of the information or statements given the defendants at the time they agreed to indorse; because it was entirely immaterial whether plaintiffs were aware of what representations were made to defendants—defendants not claiming that any representations were made to them other than those embraced in the agreement of compromise signed by plaintiffs. (Johnson vs. Baker, 4 B. & Ald., 440.) 2d. Defendants complain of that clause contained in said instruction No. 2, given by the court, which requires defendants to prove that "the fact that all creditors having claims over two hundred dollars did not sign said agreement, was unknown to

Whittemore, et al. v. Obear, et al.

defendants." The law is, as presented in defendant's instruction No. 7, if any creditor having a claim over two hundred dollars refused to sign, unknown to defendants, that fact avoided the agreement. (*Doughty vs. Savage*, 28 Conn., 146.)

J. Wickham, for Respondents.

I. The fact that some of the creditors of Beardslee & Co., whose claims exceeded \$200, failed to sign the compromise agreement, does not affect the validity of the note sued on, provided that fact was known to appellants, or either of them, at the time of indorsing the notes, notwithstanding which knowledge they elected to indorse and deliver the notes; for by so doing, they waived that objection to the validity of the notes, and assumed the liability of indorsers, notwithstanding the fact that the terms of the compromise agreement had not been fully complied with. (*Doughty vs. Clark*, 28 Conn., 152; *Kintzing's Assignee vs. Bartholow*, 1 Dill., 157.)

II. The fact that a portion of the assets embraced in the statement of Beardslee Bros. & Co., was used by them for the purpose of paying bonuses to some of their creditors to induce them to sign the compromise agreement, is no defense to this action, unless it is proven to the satisfaction of the jury, that such payments were concealed from and unknown to appellants at the time they indorsed the compromise notes, or unless it is proven that respondents received a bonus for their signature, or consented that bonuses should be paid to other creditors. The mere fact that a fraud is practiced by a principal debtor upon his surety in obtaining the signature of the surety, does not discharge the surety unless such fraud was practiced with the knowledge and consent of the obligee. (*Berge Suretyship*, p. 218; *Graves vs. Tucker*, 10 Sm. & Mar., p. 923; *Burks vs. Wonerline*, 6 Ky., (Bush.) p. 23; *Bank State of Mo. vs. Phillips*, 17 Mo., 29.) The notes cannot be affected in the hands of plaintiffs by any false statements or representations made to appellants by Beardslee Bros. & Co., without the knowledge or consent of respondents. (*Spelter vs. James*, 32 Ind., 209; *Quinn vs. Hard*, 43 Vt., 377-8.)

Whittemore, et al. v. Obear, et al.

III. Whatever effect this court might be disposed to give to said facts, that all the creditors whose claims exceeded \$200 did not sign, and that bonuses were paid to other creditors to induce them to sign the compromise agreement, as between the parties to said agreement themselves, still those facts can have no effect to release appellants, unless their indorsements were procured by a fraud participated in by both parties to the agreement.

IV. It is a well established principle of law, that when one of two innocent parties must suffer by the fraud of a third, he who trusted such third party and enabled him to commit the fraud shall bear the loss. Obear & Co., by indorsing and delivering the compromise notes, put it in the power of Beardslee Bros. & Co. to commit the fraud complained of; and cannot now ask to be released from the consequences of their indorsement, on the ground that the conditions of the compromise agreement had not been performed.

NAPTON, Judge, delivered the opinion of the court.

This is an action by Whittemore & Co. upon a negotiable note signed by Chas. Beardslee Bros. & Co., and dated June 10, 1870, for \$888.34, payable twelve months after date, at the National Park Bank, New York, indorsed by Chas. Beardslee Bros. & Co., and E. G. Obear & Co., and protested for non-payment.

The defense against the note, by the defendants, Obear & Co., is substantially this: In the spring of 1870, the firm of Chas. Beardslee Bros. & Co. was in a tottering condition, and negotiation was set on foot with their creditors, to bring about a composition, and avoid bankruptcy. The New York creditors sent a committee to Chicago to confer with Chas. Beardslee Bros. & Co., and the result was that the creditors agreed to take fifty cents on the dollar on their claims, to be paid by notes at six, nine and twelve months, provided Chas. Beardslee Bros. & Co. would get an indorser for the notes at twelve months. This agreement was to be signed by all the creditors who had demands over \$200. The plaintiffs signed

the agreement, took the notes of Chas. Beardslee Bros. & Co., and on the note at twelve months accepted the indorsement of the defendants, Obear & Co.

The defendants now say in defense against their liability, that all the creditors over two hundred dollars did not sign, and that to procure the signatures of some who did sign, one of the firm of Chas. Beardslee Bros. & Co. expended considerable sums of money, amounting altogether to \$27,000.00, in getting certain creditors, not the plaintiffs, to agree to this composition.

It is obvious from the statement, that the main questions of fact on which the liability of the defendants depended, are first, whether their indorsements were obtained on fraudulent and false misrepresentations, or whether, at the time of their indorsements they were apprized of the facts on which the supposed misrepresentations were based. And, second, supposing the defendants were imposed upon, the question remains whether they are not still liable, if the plaintiffs took the note in good faith and without any knowledge of such imposition.

The instruction on which the case was tried, is as follows: "If the jury believe from the evidence in this case, that in the spring of 1870, the firm of Chas. Beardslee Bros. & Co., being then insolvent, delivered to the defendants for their inspection and examination the printed statement of their assets and liabilities, read in evidence, and informed the defendants that they had made a proposition to their creditors to effect a compromise of their indebtedness, and an extension of time for the payment thereof; and if the jury further believe that the proposition so communicated to the defendants contained the same provisions and agreements as the paper referred to by the witness as the compromise agreement, and read in evidence in this case, and that the defendants, thereupon believing and relying upon such information, agreed with said firm to become the indorsers of the twelve months notes mentioned in said proposition, in the event of said proposition being accepted by the creditors embraced in

it; and if the jury further believe that thereafter the said firm represented to the defendants that the proposition so communicated to the defendants had been accepted by the said creditors, and that the defendants thereupon, and for the accommodation of said firm, and without any consideration paid them therefor, indorsed and delivered to said firm the notes referred to by the witnesses, having been indorsed by defendants for said firm, and that among them was the note here sued on, and that it was delivered to the plaintiffs by said firm, and that the plaintiffs did sign said paper read in evidence, and were apprised at and before the time of so doing, that defendants had agreed to indorse said twelve months notes, and of the information and statements given the defendants at the time they so agreed to indorse, then the jury are instructed, that if they also further find from the evidence, that all the creditors of said firm of Chas. Beardslee Bros. & Co. having claims above \$200 did not sign said paper read in evidence, which fact was not known to defendants, or either of them, when they indorsed said notes, or if they believe from the evidence, that any one of said creditors who did sign said paper received from said firm out of its assets, any sum in addition to said notes, as a consideration or bonus to sign said paper, which was not known to defendants, or either of them, when they indorsed said notes, then the jury must return a verdict for defendants. And in determining whether said defendants, or either of them, knew whether all of said creditors signed said paper, or whether any sum in addition to said notes was received by any creditor signing said paper, as a consideration or a bonus therefor, the jury will take into consideration all the facts and circumstances disclosed by the evidence in this case."

This instruction is complicated, and the really disputed facts and the law arising on them might have been stated, perhaps, more clearly. The result of the instruction, however, is, that plaintiffs were entitled to recover, unless the defendants were imposed on by false representations of the Beardslees, and the plaintiffs knew of such false representa-

tions, and the question for our determination is, whether this is a correct statement of the law applicable to the facts of this case.

There can hardly be a question, that if the defendants, when they indorsed the note sued on, were aware of the facts that some of the creditors had not signed the composition deed, and that the signature of others had been procured by a bonus advanced by the Beardslees, they would be liable, without regard to any misrepresentations on these points made by the Beardslees. The indorsement of the notes, under such circumstances, would clearly be a waiver of all objections based on the act or misrepresentations of the Beardslees. Assuming, however, that the defendants had no such information, and relied on the false statements made to them by the Beardslees, the question is, whether they are not still liable, if the plaintiffs had no hand in this fraudulent imposition and knew nothing of it.

The Circuit Court held that they were, and we think, although the authorities are not altogether harmonious, that the Circuit Court decided rightly. Aside from the composition agreement, negotiable notes or indorsements, in the hands of indorsees, though made simply for accommodation of the original debtor, could be enforced against such makers or indorsers, though procured by the debtor through misrepresentations made to said makers or indorsers, if the indorsees or holders were not privy to the misrepresentations or frauds or unfulfilled promises of the indorsers or makers. (*Quinn vs. Hard & Lane*, 43 Vt., 375.)

This is well settled here as well as elsewhere. If a surety on a negotiable instrument makes the principal his agent, and the agent is only authorized to deliver it on certain conditions not complied with by the agent, the surety cannot defend on the ground of frauds or misrepresentations made by his agent. (*Ayres vs. Milroy*, 53 Mo., 516; *Smith vs. Clark Co.*, 54 Mo., 77.)

This is on the principle that where one of two innocent parties must suffer, the one who has been guilty of such

laches as to put the other off his guard, ought to bear the loss. It is urged, however, that the principle above stated has no application in this case, where the composition agreement itself, which the plaintiffs signed, and of the terms of which they were of course fully cognizant, required all the creditors who had claims over \$200, to execute the agreement. The defendants therefore never promised to indorse the note until all the creditors had signed, as the agreement required they should.

The fact that the defendants were under no obligation to indorse the twelve months notes of the Beardslees, until all the creditors (over a specified sum) had signed, is one which seems to show that the plaintiffs, who were necessarily uninformed on this subject when they signed the paper or composition agreement, had a right to infer from such indorsement, presented to them by the defendants' agents, that the defendants had ascertained this fact before indorsing. It was their business to do so—it was a matter of great importance to them and of no importance to plaintiffs, provided the indorsement was valid. The plaintiffs might not be bound by the composition agreement, if all the creditors did not sign—but if they chose to waive this matter, so far as they were concerned, and take the indorsed notes for fifty cents on the dollar of their claims, and give up their claims on the receipt of the notes, it does not lie in the mouth of the defendants to set up any such waiver of the plaintiffs as a bar to their recovery. The indorsement of defendants, under the circumstances, was equivalent to their saying to plaintiffs: "It was our interest to see that all the creditors signed the agreement—we were under no obligations to become sureties except they all did—we have ascertained the fact, that they all did sign; and therefore we have indorsed the notes as sureties." How else could the plaintiffs understand the transaction? The defendants indorsed the twelve months notes, after ascertaining that all the creditors had accepted the composition, or were willing to waive the want of such signatures, if any such were wanting.

We have been referred to two cases which are said to take a different view. One is the case of Johnson and others vs. Baker, (4 Barn. & Ald., 440), and the other is a decision of the Supreme Court of Connecticut, in Doughty vs. Savage, (28 Conn., 152). The last is the one mainly relied on, as the facts in Johnson vs. Baker are quite dissimilar to the present. In this case of Johnson vs. Baker a deed was made, in which the debtor, his sureties and the creditors, were all made parties. The plea of *non est factum* was put in by the sureties. It appeared from the evidence, that after the deed was executed and signed by the debtor and the sureties, and some of the creditors, there was a conversation respecting the difficulty which might arise in case all the creditors did not execute the deed, when it was stated that the deed should be void unless all the creditors signed it. At this conversation the plaintiffs were not present, and the defendant (one of the sureties) subsequently, but at the same interview, executed the deed in the ordinary way, and without saying anything at the time of the execution. The deed was delivered to one of the creditors, who was to get it executed by the other parties.

Abbott, Ch. J., at the trial thought that the condition previously expressed, although not introduced into the act of delivery, was sufficient to make this a delivery of the deed as an *escrow*, and as it appeared that the condition had not been complied with, he held the plaintiffs not entitled to recover, and directed a non-suit. And of this opinion was the court of Kings Bench, on a motion to set aside the non-suit.

The issue in that case was upon the delivery of a deed—there is no such issue here—the delivery of the notes of Beardslee Bros. & Co., indorsed by the defendants to the plaintiffs is undisputed, and it is undisputed that such delivery was made with authority from the defendants so to deliver them.

In the case of Doughty and others vs. Savage, the plaintiffs took from the debtor, without the knowledge of the defendant, who was a surety, the notes of the debtor for the

balance of the indebtedness not covered by the composition notes, and by an arrangement with the debtor they signed the composition agreement, upon condition that the indebtedness included in the compromise should include a debt due from another party. The court held that these acts by the plaintiffs were a fraud upon the defendant, and that the plaintiffs could not recover upon the notes indorsed by defendant; and this conclusion was manifestly correct.

In this case it also appeared that one of the creditors had not signed the composition agreement, and that this agreement, in order to be binding on the creditors who signed it, was to have been signed by all the creditors, and the court held that the fact that one of the creditors had not signed, was of itself a defense against the note sued on, unless the defendant expressly waived this, or knew that the creditor had refused to sign, and that the other creditors had agreed to dispense with his signature.

Upon this point, the court observed: "The validity of defendant's indorsement must depend on the validity of the compromise agreement, which it was designed to effectuate, and to which the indorsement was like other contracts of suretyship, accessory or collateral. In regard to that agreement, it was one of its express stipulations that it should not be binding on any of the parties, unless it should be signed by all the creditors of the debtors therein mentioned. No authority can be necessary to show that without a compliance with that stipulation, the agreement would not take effect as a consummated contract, unless the execution of it by some of the creditors should be dispensed with."

In these observations of the learned judge who delivered the opinion of the court, he seems to have been of the opinion that if a creditor who signed a contract of composition could for any reason avoid his obligation to let off his debtor on the terms specified in such agreement, the composition deed was totally void as to all the creditors, and as to the debtor and his sureties, although such creditor should decline to avail himself of this right, and should accept the securities offered.

 Klostermann, Adm'r v. Loos, et al.

The case was decided rightly, beyond question, but we think the observations above quoted go further than principle or adjudicated cases warrant.

In regard to the misrepresentation alleged to have been made to defendants, or their ignorance of the fact that bonuses had been given by the Beardslees to induce some of the creditors to sign the deed of composition, we do not see how the plaintiffs, who received no such bonus, as is admitted on both sides, can be affected. This defense might be available against all the creditors who received a bonus to induce their signatures, but it is conceded that the plaintiffs received no money or notes, beyond what they were authorized to receive under the composition agreement.

The judgment must therefore be affirmed; the other judges concur, except Judge Lewis, who was not on the bench when this case was argued and submitted.

—o—

LOUIS F. KLOSTERMANN, Adm'r of JACOB TOBLER, deceased,
Appellant, *vs.* HENRY LOOS, *et al.*, Respondents.

1. *Bills and notes—Parties—Descriptio personarum—Intention.*—The question whether parties to a bill or note are to be held as individuals or in official capacities, must be determined by their intent, as gathered from the whole instrument, however inartificially it may be drawn, or however informally the intent may be expressed.

Appeal from Cape Girardeau Circuit Court.

Lewis Brown, for Appellant.

I. This action is not brought on all of the stipulations of the contract; the part herein sued on reads as follows:

"Jackson, Mo., Aug. 1868. On or before the first day of January, 1873, we, * * * * promise and bind ourselves * * * to pay to Jacob Tobler or order, the sum of seven hundred and eighty-six dollars and ninety-six cents for value received, in said Tobler advancing that amount in the building of said church as late treasurer. Said sum to bear six per cent. interest from Jan. 1, 1869. * * * [Signed.]

The above is a promissory note for the direct payment of money to Jacob Tobler or his order, for value received; and by the express provisions of the statute is due and payable as therein expressed. (Wagn. Stat., 216, § 15, note 3.) It is not a necessity, nor is it obligatory upon a plaintiff to sue upon all of the stipulations or conditions of a note or contract—some may be omitted in the petition. (Brooks vs. Ansell, 51 Mo., 179; Comstock vs. Davis, *Id.*, 570 [McGee vs. Larrimore, 50 Mo., 426 is not in point]; Rogers vs. Carver, 21 Mo., 519.)

II. The parol evidence of the congregations was inadmissible to add to, change, vary or take from said instrument, nor to explain it, for there is no latent or apparent ambiguity therein. So, too, under the statute, the one party (Tobler) being dead, a member of the congregation, being interested, cannot testify. (Wagn. Stat., 1372, § 1.) The note itself shows plainly and conclusively the official as well as the personal liability of the signers, as follows: "On or before the 1st day of January, 1873, we, the undersigned trustees of the Evangelical Lutheran Church, at Jackson, Mo., for ourselves, as such trustees, and our successors in office, promise and bind ourselves for said congregation and such successors in office," etc. This is not only an official but a personal liability, and a personal obligation as to the personal liability. (McClintock vs. Bryant, 1 Mo., 428; Rogers vs. Carver, 21 Mo., 519; Buckley vs. Briggs, 30 Mo., 455.)

Houck & Ranney, for Respondent.

I. The instrument sued on very clearly shows the position in which defendants stand to the instrument, and the way in which they are to be bound by it. They say, in that instrument, that they bound themselves, not as individuals for their own private interest, as plaintiff's counsel insists, but "as such trustees." The instrument further shows that, when the signers went out of office, their successors were bound by the contract in the same way that they had been bound. The

Klostermann, Adm'r v. Loos, et al.

words of the instrument forbid the construction of a personal liability of defendants, but show that they are liable as trustees, and they contracted as such for themselves and their successors; and as such trustees, defendants and their successors are liable, and not otherwise. (*Rogers vs. Carver*, 21 Mo., 517.) The maker of a note is not personally liable when he signs as the agent or director of a third party. (*McGee vs. Larrimore*, 50 Mo., 425.) And if an agent puts his own name officially to an obligation, and not the name of the principal, it does not necessarily become the obligation of the agent. (*McClellan vs. Reynolds*, 49 Mo., 312; *Smith vs. Alexander*, 31 Mo., 193; *Shuetze vs. Bailey*, 40 Mo., 69; *Musser vs. Johnson*, 42 Mo., 74.) But plaintiff's counsel attempts to avoid this, by stating that he did not sue on all of the contract—that is, he sued on the part most favorable to him, and omitted everything which tended to weaken and destroy his claim. It is admitted that where a contract contains several independent agreements, that suit may be brought for a breach of any one; but this is not such a case.

II. Had the instrument not contained the words which explain the character of the signers, or the way in which they were to be bound by the terms of the instrument, it was perfectly legal for us to introduce parol testimony to show that the note was executed with a certain and express understanding between the parties, and to show what the terms of that understanding were. (*Foster vs. Wallace*, 2 Mo., 231; *Garret vs. Ferguson's Adm'r*, 9 Mo., 125; *Ayres vs. Milroy*, 53 Mo., 516.)

SHERWOOD, Judge, delivered the opinion of the court.

The decisive question in this case is, whether the defendants, who are the trustees of a certain church organization, are individually liable on a contract in this form:

“JACKSON, Mo., August, 1868.

“On or before the 1st day of January, 1873, we, the undersigned, (trustees of the Evangelical German Church at Jackson, Missouri, for ourselves as such trustees, and our succes-

Klostermann, Adm'r v. Loos, et al.

sors in office) promise and bind ourselves, (for said congregation and such successors in office) to pay to Jacob Tobler or order, the sum of \$786.96, for value received in said Tobler advancing that amount in the building of said church, as late treasurer; said sum to bear interest at the rate of six per cent. per annum, from and after the 1st day of January, 1869, (and said sum shall be and remain a lien on said church building until fully discharged, by payment of principal and interest). In witness whereof, we have hereunto signed our names the date above written.

CHAS. HARENBURG,
JACOB FRIEDRICH,
ADAM HOFFMAN,
HY. LOOS, } Trustees."

As the plaintiff seeks to charge them, not in their official but in their individual capacity, asserting that his action is brought on only such portion of the instrument sued on as is not inclosed in brackets.

One of the defenses set up in the answer of the defendants, was, that they had signed the instrument in question, as *trustees* of the above mentioned church, and not otherwise, and the truth of this allegation finds abundant confirmation in the face of the instrument itself, the fundamental and controlling idea of that evidently being the entire preclusion of all personal liability on the part of those who signed it. The intention of the defendants to bind themselves and their successors in office, "*as such trustees*," runs throughout the entire instrument, unless the words employed to convey that idea have suddenly lost their usual signification. For the promise is made and the obligation entered into, in an *official* and not an *individual* capacity: "For said congregation and such successors in office," and not in any other way. And in one and the same sentence, "the Evangelical German Church at Jackson, Mo.," is disclosed as the principal, and the defendants pointed out as the mere agents of that organization. And without the insertion of words expressive of absolute negations of all personal liability, it is difficult to perceive how the fact of agency could be more efficiently expressed. The

adjudications, however, of the various courts, as to the formalities to be observed, in order to disclose and cast liability on the principal, while at the same time accomplishing the exoneration of the agent, are not in full accord. Some courts holding the agent, in designating his principal, to the use of an extreme precision of language, scarcely compatible with the exigencies incident to the prompt execution of business, while others adopt the more rational as well the more generally prevalent doctrine and liberal policy of allowing the intent of the parties to govern, and that intent to be gathered from the whole instrument, regardless of the latter being inartificially drawn or the former informally expressed. And this is the line of adjudication which has received the approval of this court in repeated instances. (*Shuetze vs. Bailey*, 40 Mo., 69; *Musser vs. Johnson*, 42 Mo., 74; *McClelland vs. Reynolds*, 49 Mo., 312.)

And if the instrument is so uncertain in its terms as to throw the matter in doubt, whether the principal or agent is to be held bound, such uncertainty may be obviated by the introduction of parol testimony. (*Musser vs. Johnson*, *supra*; *Shuetze vs. Bailey*, *supra*; *Smith vs. Alexander*, 31 Mo., 193; *Washington M. & F. Ins. Co. vs. St. Mary's Seminary*, 52 Mo., 480; *Id.*, 556.)

And this explanation of a patent ambiguity by no means contravenes the rule as to varying or controlling a written contract. (See above authorities.)

The evidence offered, then, by defendants for this purpose, was not inadmissible. Nor was there anything in the objection taken, that as Tobler, one of the original parties to the contract, was dead, the members of the congregation could not testify by reason of that fact. The witnesses introduced were not parties to the suit, and therefore did not in this regard fall within the statutory inhibition. (*Looker vs. Davis*, 47 Mo., 140.)

The judgment is affirmed; the other judges concur.

Curtis v. Ward, Adm'r.

CHARLES H. CURTIS, Respondent, *vs.* DEMUS D. WARD, Adm'r
of JOHN D. MEREDITH, dec'd, Appellant.

1. *Revenue—Stock in National Bank, liable to taxation.*—Shares in National Banks are liable to assessment and taxation in this State. (*Lionberger vs. Rowse*, 43 Mo., 67; *First Nat. Bank vs. Meredith*, 44 Mo., 500, affirmed.)
2. *Revenue—Personal property of non-residents.*—Personal property of non-residents which is found within the local jurisdiction is taxable here, regardless of whose hands it happens to be in.

Appeal from Sixth District Court.

Henderson & Shields, for Appellant.

James Carr, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The plaintiff brought suit in the Hannibal Court of Common Pleas against Meredith, who was the collector of Marion County, to recover the amount of State and county taxes collected of him. The petition alleged that plaintiff was a resident of the State of Illinois, and that he was the owner of certain shares of the capital stock in the First National Bank of Hannibal, in this State, and that the same was assessed to him in Marion County; that the assessment was made without authority of law, and was illegal; that the stock was exempt from taxation, but, notwithstanding, the defendant levied upon the same and was about to sell it, to satisfy the taxes, when plaintiff, to prevent a sale and have the stock released, caused the taxes to be paid under a written protest.

Judgment was therefore demanded for the amount.

To this petition a demurrer was filed, which was by the court overruled, and the defendant refusing to answer, and electing to stand on his demurrer, a judgment absolute was rendered for the plaintiff. The defendant then appealed to the late District Court, where the judgment of the Common Pleas was affirmed, and from that decision the cause was brought here.

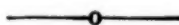
Two questions have been presented to this court: First—whether shares of stock in National Banks are taxable under the laws of this State? Secondly—whether the stock being per-

sonal property could be taxed here, when the plaintiff was a resident of another State? Since this suit was instituted, both of these questions have been determined in the affirmative. That the shares in National Banks are liable to assessment and taxation in this State, has been repeatedly decided and is no longer an open question. (*Lionberger vs. Rowse*, 43 Mo., 67; *First Nat. Bank vs. Meredith*, 44 Mo., 500.)

It is equally well established, that the personal property of a non-resident is taxable here if it be found situate within the local jurisdiction, regardless of whose hands it may happen to be in. (*St. Louis vs. Wiggins Ferry Co.*, 40 Mo., 580; *Taylor, Adm'r vs. St. Louis County Court*, 47 Mo., 594.)

In the recent case of *Tappan vs. The Merchant's Nat. Bank of Chicago*, before the United States Supreme Court, (not yet reported) it was held that the State, within which a National Bank is situated, has jurisdiction for the purpose of taxation of all the shareholders of the bank, both resident and non-resident.

It follows therefore, that the court erred in overruling the demurrer and its judgment will be reversed; the other judges concur.



SAMUEL W. CLAPP, Respondent, *vs.* DEMUS D. WARD, Adm'r
of JOHN D. MEREDITH, dec'd, Appellant.

1. *Curtis vs. Same*, *ante* p. 295, affirmed.

Appeal from Sixth District Court.

Henderson & Shields, for Appellant.

James Carr, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

This case is in all respects similar to the case of *Curtis vs. Ward, Adm'r*, decided at this term, and in accordance with the principles there laid down, the judgment must be reversed; the other judges concur.

CHARLES E. SMITH, Plaintiff in Error, vs. THE TOWNSHIP BOARD OF EDUCATION of Township 39, Range 5, Jefferson County, Mo., Defendant in Error.

- I. *Schools, sub-district—Formation of, what illegal—Action by teacher for services.*
—Under the statute (Wagn. Stat., p. 1245, § 17) a school sub-district cannot be lawfully formed out of territory situated in two townships, without a joint meeting of the township boards of education. The fact that one board held such meeting, and that the individuals constituting the other board, signed a paper purporting to relinquish the territory in their township would not render the formation of the sub-district valid. And no action will lie for services as teacher under a contract made with the local directors of such sub-district.

Error to Jefferson Circuit Court.

Joseph J. Williams, for Plaintiff in Error.

I. A teacher is not bound to enter upon an inquiry as to the regularity of the proceedings by which a district is created before making a contract, otherwise no teacher would be safe. If the district has a *prima facie* existence, that is, if it is recognized by the township board as such, and a board of local directors, whether elected regularly or not—holding office under color of right, the contract will be binding.

John L. Thomas & Bro., for Defendant in Error.

I. These boards of education are creatures of the statute and have only statutory jurisdiction, and their authority should be strictly construed. (33 Penn. St., 298; 8 Harris, 324; 1 Barr, 97; 34 Iowa, 306.)

II. A board of education being a corporation can only act in its corporate capacity. The individual members, though a majority or all acting independently, cannot bind the corporation. (22 Ohio, 144.)

VORIES, Judge, delivered the opinion of the court.

This action was brought before a justice of the peace to recover the amount of an order executed to the plaintiff by one John W. Tullack, clerk of the local board of directors of sub-district No. 6, Township No. 39, Range No. 5, and requiring the clerk of defendant to pay the plaintiff \$75 for teaching a school for three months in said sub-district No. 6.

A trial was had before the justice where the plaintiff recovered a judgment for the sum named in the order with costs. The plaintiff appealed to the Jefferson Circuit Court where a judgment was rendered in favor of the defendant. The plaintiff filed a motion for a new trial which was overruled by the court, and the case is brought here by writ of error.

On the trial in the Circuit Court the plaintiff introduced John W. Tullack, as a witness, who testified that himself, G. W. Byrd and Reed Sweet were the local directors of sub-district No. 6, township 39, range 5, from September, 1872 to April, 1873, when they were re-elected to said offices; that as such directors, they entered into a contract with the plaintiff for the teaching of a school by plaintiff in said district. The contract entered into between said local directors and plaintiff was then offered in evidence. The defendant objected to the contract as evidence, for the reason that there was a variance between it and the pleadings in this, that the contract designated the district in which the school was to be taught as district Nos. 1 and 9, instead of sub-district No. 6. The witness, Tullack, then explained the contract by stating that it was well understood between the plaintiff and said directors, to be a contract to teach a school in sub-district No. 6, and that plaintiff had taught school for three months at a school-house in said district No. 6, as designated in the records of the board of education; that the school so taught, commenced on the 6th day of January, 1873. The witness further stated that in the contract offered in evidence, the district in which the school was to be taught was designated as sub-district 1 and 9, which so happened for the reason that the district was composed of parts of two school townships, that is, a part of each of the townships 1 and 9, and the numbers of the two townships were inserted in place of the number of the district, by mistake or oversight; that all parties intended the contract to be for the teaching of a school in sub-district numbered six, and that the contract was so acted on and the school so kept in sub-district No. 6. After this evidence the contract was read in evidence and the defendant excepted.

The contract was in the usual form except as to the error in the number of the district. The witness, Tullack, further testified, that he, as sub-district clerk of said district six in township No. 39, range 5, gave the plaintiff the order sued on, which was drawn on the township clerk of said township for the sum of \$75, at the close of the three months school taught by plaintiff. The order was admitted to be in due form; and it was admitted by defendant, that the order had been filed amongst the papers in the case and was lost. It was also admitted, that the County Court of Jefferson County had, many years ago, numbered the several school townships in the county from one to eighteen, inclusive, and that they were known by their respective numbers prior to the passage of the late school law.

The plaintiff then read in evidence an entry, on the record kept by the township board of education, for township No. 9, by which it is shown, that at a special meeting of said board held on the 21st day of September, 1872, at which a tract of country composed partly of township No. 1, and partly of township No. 9, was set off and denominated as district No. 6. Also an entry of April 19th, 1873, by which it was shown that John W. Tullack was elected clerk for district No. 6, and that on said last named day, it was resolved by said board, that district No. 6, formed on the 21st day of September, 1872, be abolished, and districts 1 and 5 remain as they formerly were before such organization.

The plaintiff also read in evidence a statement which purported to be signed by the members constituting the board of education of township No. 1, dated August 15th, 1872, and in which they in language relinquished all control over the territory which was afterwards included in district No. 6, and which part of said district was included in township No. 1. This paper did not purport to be a copy of any record or proceedings had by said board of education for township No. 1; but was only an instrument signed by those who signed their names as individual members of said board.

This paper was, at the time, objected to by the defendant for the reason that the paper was not offered as a copy of a record or proceedings of the board, but was simply an instrument signed by individuals who assumed to be members of said board of education. The court overruled the objection and received the evidence; to which action the defendant excepted. Plaintiff also read an entry made on the record of the board of education for township No. 9, made on the 7th day of December, 1872, by which said board rescinded the order made on the 21st of September, 1872, in regard to the formation of district No. 6. It was proved by the clerk that no notice was given of the meeting at which this last order was made.

It is also shown by the evidence, that on the 11th of January, 1873, the board of education for township 9 held a special meeting to inquire into the action of the board in reference to the formation of district No. 6, and on the 21st September, 1872, "after due consideration, decided to let district six stand as organized September 21st, 1872." This was substantially all of the evidence in the case.

There were a number of declarations of law asked by the parties, some of which were given and some refused; but it is not material that they should be noticed as the court evidently decided the case for the defendant on the ground that the evidence failed to show that any such sub-district as sub-district No. 6, was ever legally formed, or in other words, that the attempt to form said district was wholly outside of any authority given to the township board for said purpose. It will therefore not be necessary to notice any other of the various points raised by parties in this court.

It must be recollected that district No. 6 was, if formed at all, formed out of territory partly situated in township numbered 9, and partly situated in township No. 1. The statute authorizing school sub-districts to be formed out of territory included partly in each of two different townships provides, that "the boundaries of such sub-districts shall be established by the boards of education of the various townships

interested, and for the purpose of forming such sub-district, it shall be the duty of the township boards interested to meet at some central point in said sub-district, designated by notice—said notice to be given by either of the townships interested—and proceed to lay off and define the boundaries of such sub-district; and if fractional parts of any of such sub-districts shall be situated in two or more counties the directors shall forward a list, etc.”

In the present case no joint meeting of the different boards of education of the different townships concerned was ever held or attempted to be held for the purpose of forming district No. 6. The notice was for a meeting of the board of education of township numbered 9, and they attempted to form a district out of territory, a part of which was in another township, which said board had no power to do. And it makes no difference that the individuals constituting the board of education of the other township concerned, signed a paper purporting to relinquish any control over the part of the territory in the township which they represented. This paper was a mere nullity and ought to have been excluded by the court. If a meeting had been held by the joint boards of the two townships, and the school district organized, although there might have been irregularities in the meeting and in the formation of the district, we would be disposed to overlook any mere irregularities which should have taken place; but where no attempt was made to conform to the law, by holding the joint meeting provided for, the action of the board cannot be upheld; nor can the formation of such sub-district be sustained under such circumstances. (*Ohio, etc. vs. The Treasurer of Liberty Township*, 22 Ohio, 144; *The District, etc. vs. The District of Burr Oak*, 34 Iowa, 306, and *cas. cit.*)

The judgment will be affirmed; the other judges concur.

Haskings v. St. L., K. C. & N. R. R. Co.

ALLEN HASKINGS, Respondent, vs. ST. LOUIS, KANSAS CITY & NORTHERN RAILWAY Co., Appellant.

1. *Evidence, presumption of—Continuance of a state of facts once proved to exist.*—Evidence of the existence of a state of facts at a certain time raises a presumption that such facts exist for a reasonable time thereafter.
2. *Practice, civil—Trials—Instructions not applicable to facts as proved, improper.*—Instructions which do not apply to the facts of the case, as shown by the testimony, are improper, even though they correctly declare abstract propositions of law.
3. *Practice, civil—Trials—Instructions, improper, not ground for reversal unless misleading.*—The giving of improper instructions is not alone sufficient ground for reversal, unless they have had the probable effect of misleading the jury.

Appeal from St. Charles Circuit Court.

W. Blodgett with M. McKeag, for Appellant.

John A. Kellar with John B. Allen, for Respondent.

VORIES, Judge, delivered the opinion of the court.

This action was commenced before a justice of the peace to recover damages under the 43d section of the act of the legislature of this State, concerning railroad companies, (Wagn. Stat., 310) for the killing of certain hogs by the defendant, belonging to the plaintiff.

The cause of action filed before the justice, was, in substance, as follows: After stating that the defendant was a railroad corporation, etc., it proceeds to state, that the plaintiff was the owner of two certain blooded brood sows; one of the value of twelve dollars, and the other of the value of fifteen dollars; that the defendant being the owner of the cars and locomotives of the St. Louis, Kansas City and Northern Railway, did by its agents, servants and employees, and without any fault or want of care on the part of plaintiff, carelessly and negligently, and by the negligent conduct of defendant's agents and servants, run over and kill the said hogs in Cuivre township, near a railroad crossing at a place where said road passes through and adjoining inclosed and cultivated fields, and where defendant was bound by law to fence said railroad

and erect cattle guards thereon; that the defendant had failed to fence said road or erect sufficient cattle guards thereon at the place where said hogs went on said railroad and were killed; that the hogs were killed on a portion of the road which was not fenced in a sufficient manner, and not at the crossing of a public highway; that plaintiff was damaged in the sum of twenty-seven dollars, and claims double damages, etc.

A judgment was rendered by the justice, in favor of the plaintiff, from which the defendant appealed to the Circuit Court of St. Charles county. The case was tried in the Circuit Court before a jury. The plaintiff introduced evidence tending to prove the facts stated in the petition.

The evidence tended to show that the hogs were killed at a point on the road of defendant, where the road was not fenced, and where it ran along and adjoining inclosed and cultivated fields, about two hundred yards from a road crossing where there were cattle guards. A witness was asked to state the condition of the cattle guards at the road crossing referred to, at the time and prior to the time of the accident. The witness answered that he did not know the condition of the cattle guard at the time of the accident; but prior to that time, in the winter and spring previous, he had seen hogs pass through the cattle guard frequently, without difficulty. The foregoing question and answer were objected to by the defendant, on the ground that the evidence was immaterial and irrelevant. The objection was overruled, and the defendant excepted. The defendant offered no evidence.

At the close of the evidence the court instructed the jury, that, before the plaintiff could recover, the jury must be satisfied from the evidence, that the property, on account of which the suit was brought, was killed by the defendant's locomotive machinery on a part of the defendant's road passing through cultivated or inclosed fields, and that the road at said place was not fenced in at the time, or that the hogs got on the track in consequence of defective fencing or cattle guards; that the measure of damages in the event of a recov-

ery, was the market value of the property killed at the time of the killing. The defendant objected to this instruction, and the objection being overruled, it at the time excepted.

The plaintiff's attorney then asked the court to instruct the jury as follows: "That it is the duty of the railroad company or corporation to erect and maintain good and substantial fences on the sides of its road, where the same passes through, along or adjoining inclosed or cultivated fields or uninclosed prairie lands, of the height of at least five feet, with openings and gates or bars therein, and farm crossings of the road for the use of the proprietors or owners of the land adjoining such railroad; and also to construct and maintain cattle guards at all railroad crossings where fences are required as aforesaid, suitable and sufficient to prevent horses, cattle, mules and all other animals from getting on the railroad, until such fences, openings, and gates or bars, farm crossings or cattle guards shall be duly made and maintained, such corporation shall be liable in double the amount of all damages which shall be done by its agents, engines or cars, to horses, cattle, mules or other animals on said road, or by reason of any horses, cattle, mules or other animals coming upon said lands, fields or inclosures, occasioned in either case by the failure to construct or maintain such fences or cattle guards." To this last instruction the defendant also objected, and its objection being overruled and the instruction given, the defendant again excepted.

The jury found a verdict for the plaintiff, and assessed his damages at the sum of twenty-seven dollars. This amount was doubled by the court, and judgment rendered in favor of the plaintiff, for fifty-four dollars and costs. The defendant filed a motion for a new trial, setting forth as grounds therefor the rulings of the court before excepted to, as well as that the court erred in rendering judgment for double the amount of the damages found by the jury. This motion was overruled and the defendant excepted and appealed to this court.

The first ground of objection urged by the defendant in this court, is, that the Circuit Court erred in permitting the plaintiff to prove on the trial, that a short time before the accident complained of, the cattle guard, at the crossing of the road, was insufficient to prevent the passage of stock over the same on and to the track of the railroad.

It is insisted that this evidence was immaterial, because it did not relate to the exact time of the happening of the accident. The hogs were killed in March or April; the witness testified that the cattle guard was in an insufficient condition in the winter or spring previous. This evidence of course was too remote to have any great weight or to be conclusive in its character, but it was sufficient to raise some presumption that the cattle guard was insufficient at the time of the accident, at least in the absence of any attempt on the part of the defendant to show that the condition of the cattle guard had been changed. In this case, however, the evidence shows that the hogs were killed at least two hundred yards from the cattle guard, and it is not even pretended that the road was fenced where the killing took place, at the time of the killing, so that the supposition that the hogs got on the track of the road through the cattle guard, is so remote that it cannot be seen how it could be material to prove that the cattle guard was insufficient; but in any view of the case the evidence could have had no injurious effect on the defendant, as there was no evidence in the case that tended to prove that the hogs were killed or got on the road at the crossing of the road, and the liability of the defendant would be just the same whether the cattle guard was sufficient or not. The defendant could not therefore be injured by the evidence.

It is next contended that the court improperly rendered a judgment for double damages; that there were two causes of action stated in the complaint filed before the justice, one being a cause of action for negligence at common law, and the other being a cause of action under the statute. This objection is not well taken. There is but one cause of action stated in the petition. It is true that the statement

charges that the killing of the hogs was negligently done, which was unnecessary, but that created no new cause of action, nor did it change the cause of action sufficiently stated under the statute; it was surplusage in the petition, and nothing more.

The only remaining objection raised by the defendant is, as to the second instruction given by the court, which was given to the jury at the request of the plaintiff. This instruction simply tells the jury that the 43d section of the statute concerning Railroad Companies, is the law, or, in other words, it tells the jury, in the language of the statute, that if the provisions of the section (which are repeated in the instruction) are not complied with by a railroad company, and injury is done, the company would be liable in double the amount of the damage done.

It is contended by the defendant, that under such instruction the jury would be authorized to find double the amount of the damages proved on the trial, and that it would be manifestly unjust in such case for the court to render a judgment for double the amount of the damages found. If the instruction complained of had been the only instruction given to the jury by the court, there can be no doubt about the impropriety of the instruction; and in fact, we cannot see any propriety in the asking for or giving such an instruction. The court had already given an instruction fully covering all of the facts and the law governing the case, and it is remarkable that the plaintiff should have asked the court to give this second instruction, which could be of no other use than to incumber the record with an abstraction which in itself may be, and is certainly the law as contained in the statute; but the most of which could have no application to the facts of this case. The court had, however, properly instructed the jury in its first instruction. The jury were told in that instruction what it was necessary for them to find before they could find for the plaintiff, and in the event of their finding for the plaintiff, "the measure of damages is the market value of the property killed." This presented the matter fairly to the jury, and gave them the proper rule of damages.

Benoist, et al. v. Murrin, et al.

The question now is, was the second instruction calculated to mislead the jury in reference to the measure of damages? The instruction was certainly improper, and if there was the least reason to doubt as to what rule had been adopted by the jury in estimating the damages in this case, the judgment would most certainly be reversed. It will be seen, however, in this case, that all of the evidence in reference to the amount of damages given on the trial, is contained in the evidence of three witnesses, two of whom estimated the value of the hogs killed to be over thirty dollars, while the third estimated their value at twenty-seven dollars, the exact amount of the verdict of the jury. To believe that the jury had estimated anything more than single damages in finding their verdict, would be to believe that they had entirely disregarded the whole evidence in the case, as well as the first instruction of the court in reference to the measure of damages.

It therefore plainly appears that the jury was not misled by the second instruction, and that their finding as to the amount of damages was proper. Therefore, notwithstanding the second instruction was improper, it plainly appearing that it produced no injury to defendant, the judgment will be affirmed; the other judges concur.

—O—

SANGUINET H. BENOIST, *et al.*, Appellants, *vs.* JAMES MURRIN,
et al., Respondents.

1. *Wills, contest concerning—Burden of proof—Right to open and close case.—*

When the validity of a will is contested, and the defendants are endeavoring to establish a hold under the will, they have the affirmation of the issue to be tried, and the burden of proof remains with them throughout the trial.—They are thereupon entitled to the opening and conclusion.

2. *Wills—Disposing mind and memory defined.—*

A disposing mind and memory may be said to be one which is capable of presenting to the testator all of his property and all the persons who come reasonably within the range of his bounty; and if a person has sufficient understanding and intelligence to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will.

Benoist, et al. v. Murrin, et al.

3. *Wills—Capacity of testator—Insanity.*—Whenever a person imagines something extravagant to exist which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delirium relates to his property, he is then incapable of making a will. But to invalidate the instrument it must be directly produced by the partial insanity or monomania under which the testator was laboring.
4. *Wills—Contests touching—Province of jury—Instructions.*—In contests touching a will, it is the province of the jury to determine simply whether or not the will is a valid instrument. It is not one of their functions to make an equal distribution of the property or determine whether ample provision had been made for all persons reasonably to be presumed to come within the range of the testator's bounty, and instructions which direct their attention to such questions are erroneous.

Appeal from St. Louis Circuit Court.

Trusten Polk, for Appellants.

I. The court erred in refusing the third instruction prayed by plaintiffs. This instruction in effect asserted several propositions of law, which are correct.

a. The first proposition is, that a sound and disposing mind and memory are necessary to testamentary capacity. This proposition, I take it, is too plain for argument or authority. It is the universal assertion of all the authors and of all the courts.

b. The second proposition of the instruction is a definition of the word "sound," as required in the mind of the testator, to constitute him capable of making a will. It asserts that "sound signifies whole, unbroken, unimpaired, unshattered by disease or otherwise." This is the very definition of the word given by the court in *ipsissimis verbis*, in the case of *Den vs. Johnson*, (2 Southard, 454).

c. The third proposition of the instruction contains a definition of the word "disposing," as a requisite to testamentary capacity in the mind of a testator to make him competent to make a will.

1. It asserts, first, that a "disposing mind and memory is a mind and memory capable of recollecting all the testator's property and its amount, condition and situation." (Redf. Wills, 123-4, § 5; 126, § 9; *Converse vs. Converse*, 21 Vt.,

170; *Hindon vs. Kerry*, 14 Bur. Ecel. Law, 85, 88 [cited in Redf. Wills, 97, n. 3]; *Harwood vs. Baker*, 3 Moore's Priv. Conn. Cases, 282; *Daniel vs. Daniel*, 39 Penn. St., 207-8; *Den vs. Johnson*, 2 South., 454; *Clark vs. Fisher*, 1 Paige, 173.)

2. The third proposition asserts, secondly, that the testator's mind must be capable of estimating his property and dividing it out, and of comprehending the scope and bearing of the provisions of the will. (*The Parish Will Case*, 23 N. Y., 29.)

3. The third proposition asserts, thirdly, that the testator must have a mind capable "of discussing and feeling the relations, connections and obligations of family and blood." (*Den vs. Johnson*, 2 South, 454; Redf. Wills, 534, § 47, and cases cited.)

4. "And of recollecting all the persons who come reasonably within the range of his bounty. (Redf. Wills, 123-4, § 5.)

5. "And also all that he had previously done for any and each of them." (Redf. Wills, 126, § 9.)

6. "And also the number, condition and circumstances of those who are the proper objects of his bounty, and also of weighing their deserts, with respect to conduct, capacity and need, remembering all and forgetting none." (Redf. Wills, 125-6, § 9; *Clark vs. Fisher*, 1 Paige, 171; *Hinson vs. Kersey*, *ubi supra*; *Beck's Med. Jurisp.*, 860; *Parish Will Case*, 25 N. Y., 29; *McClintock vs. Curd*, 32 Mo., 40; *Harrison vs. Rowan*, 3 Wash. C. C., 585; *St. Legu Will Case*, 34 Conn., 434; *Gen. Stat.*, 1865, 528, § 9.)

II. The court below committed error in refusing the second instruction prayed by plaintiffs. That instruction asked the court to declare, that if the jury should find, that, at the time S. A. Benoist executed the instrument propounded as his will, he was possessed of false and exaggerated opinions, of which he could not divest himself, of the several matters of fact therein enumerated, and that these caused and determined the disposition of his property contained in the instru-

Benoist, et al. v. Murrin, et al.

ment, then the jury ought to find that said instrument was signed by him under a delusion and mistake, and that it was not his will. The proposition of law asserted in this instruction is sound. (*Waring vs. Waring*, 6 Moore's Priv. Coun. Cases, 349; *Stanton vs. Weatherox*, 16 Barb., 259.)

But the court gave another instruction embodying hypothetically the very same matters of fact contained in this second instruction of plaintiff, and in it told the jury, that if these false opinions solely caused and determined the dispositions of his property contained in the instrument purporting to be the will of Benoist, then the jury ought to find that said instrument was signed by him under a delusion and mistake, and that it was not his will. The court committed an error in putting the word "solely" in the instruction.

III. The errors hereinbefore complained of, are not obviated by the instructions given by the court, on its own motion, as has been already shown, nor by any given upon the motion of the defendants.

S. Knox, for Appellants.

I. The first and second instructions given by the court were not the instructions asked by plaintiffs, but the plaintiffs' instructions modified by the court. The third instruction given on a motion of defendants, as to what constitutes testamentary capacity, is erroneous. A man may be a monomaniac, or be under a delusion which influenced the provision in the will, and still possess the testamentary capacity prescribed in this instruction. (1 Barb., 259; 1 Redf. Wills, 86, 7, 8, 9, 122-3, 125.) The written offer of plaintiffs filed in this case, entitled the plaintiffs to the opening and conclusion of the case. The court refused to allow the plaintiffs this right.

E. C. Casselberry, for Appellants.

I. If a will is not the act or product of the mind, it is no will. It is only the mechanical act of the hand in executing the instrument. (See the following definitions of a will: *Jarm.*, Wills, vol. 1, p. 1, and authorities cited; *Bonv. Law. Dict.*, vol. 2, p. 665; *Bacon's Abridg.*, vol. 8, p. 433, letter "A;"

Cooper's Justinian, 112; Moreau & Carleton's Partidas, vol. 2, p. 961.)

II. A will is the serious and deliberate act of the mind, built upon reason and judgment, after a full examination of the whole subject, and all of the facts and circumstances connected therewith. Any instrument of writing falling short of this, no matter how formally the same may be drawn and attested, is not in law a will. No matter how sound a person's mind may be, if, from misconception, mistake, oversight, forgetfulness, or other cause, the instrument is not the act or product of his mind, it is not in law his will. Many things a person of perfectly sound mind does by or through misconception, mistake, oversight, forgetfulness, or other cause, which could not, with any degree of seriousness, be considered the act or product of the mind. A person may be perfectly sane on all subjects save one, and be perfectly insane on that one subject, and no one would be aware of his partial insanity, except those who might happen to converse with him on the subject on which he is insane.

As to the effect of delusion on mental soundness for testamentary purposes, see *Tayl. Med. Jur.*, p. 626; *Redf. Wills*, 71-76; 1 *Jarm. Wills*, 58-79; *Shelf. Lunacy*, 296; *Patterson vs. Patterson*, 6 S. & R., 56; *Seaman's Friend Society vs. Koffer*, 33 N. Y., 619; *Harrell vs. Harrell*, 1 *Duvall*, 203.

As to the effect of partial insanity, see *Cooper's Justinian*, 146; *Kevil vs. Kevil*, 2 *Bush*, 614; *Harrell vs. Harrell*, 1 *Duvall*, 203; *Gamble vs. Gamble*, 29 *Barb.*, 373; *Jarm. Wills*, vol. 1, pp. 79, 80; 2 *Stark. Ev.*, (5 Am. Ed.) 392; *Shelf. Lunacy*, 279, 280; *Thompkins vs. Thompkins*, 1 *Baily*, 92; *Groves vs. Grant*, 2 *Green Ch.*, 620, 635, 636; *Couch vs. Couch*, 7 *Ala.*, 519; *Dean vs. Littlefield*, 1 *Pick.*, 243; *Hall vs. Warren*, 9 *Ves.*, 610; *Clark vs. Lear* cited, 1 *Pill.*, 119; *Davis vs. Calvert*, 5 *Gill. & Johns.*, 269, 301; *Beaubien vs. Cicotte*, 12 *Mich.*, 459; *Redf. Wills*, Ch. 10, § 55, p. 537, vol. 1, 2nd. Ed.

As to the mental capacity required, see 1 *Redf. Wills*, 121, 122, 123, 123; *Den vs. Johnson*, 2 *South.*, 454; *Boyd vs. Eby*, 8 *Watts.*, 66; *Clark vs. Fisher*, 1 *Paige*, 171; 3 *Sandf.*, 351; 2 *Conn.*, 498.

III. Where the will is unreasonable in its provisions, and inconsistent with the duties of the testator, with reference to his property and family, or what the Civilians denominated an inofficious testament, this of itself will impose upon those claiming under the instrument, the necessity of giving some reasonable explanation of the mental character of the will, or at least of obliquity or perversion. (Redf. Wills, vol. 1, p. 515; *Clark vs. Fisher*, 1 Paige, 171.)

"Anything in the character of the will which renders it contrary to natural affection, or what the civil law writers denominated an undutiful testament, as where children or others entitled to the estate in case of intestacy are wholly disinherited; or if not wholly deprived of a share, it is given in such unequal proportions as to indicate that it is done without any just cause, and wholly dependent upon caprice or over persuasion or deception, it must always excite apprehension of undue influence, at the very least." (Redf. Wills, 1, pp. 520-1, 2nd Ed.)

Gross inequality in the disposition of the property where no reason for it is suggested, either in the will, or otherwise, may change the burden of proof and require explanation on the part of those who support the will, to induce the belief that it was the free and deliberate off, spring of a rational mind. (Redf. Wills, 1, pp. 537, 538; *Beaubien vs. Cicotte*, 12 Mich., 459; *Nelson vs. Wyan*, 21 Mo., 347; *Weaver's Appeal*, 63 Penn. St., 309.)

IV. The court erred in not giving the opening and conclusion to the plaintiffs. The written admissions obviated everything that the Supreme Court of Missouri objected to on the subject. The decisions of the Supreme Court have not apparently been uniform on the subject of opening and conclusion. (*McClintock vs. Curd*, 32 Mo., 411.) On carefully examining the case of *McClintock vs. Curd*, and also the case of *Farrell vs. Brennan*, (32 Mo., 328,) it will be seen that we come within the reasoning of these decisions, and do not fall within the general rule laid down in the other two cases in 48 Mo., 291.

Thomas Gantt with Glover & Shepley, for Respondents.

I. The action of the court in giving the opening and the close of the case to the supporters of the will was proper. (*Tingley vs. Cowgill*, 48 Mo., 291; *Cravens vs. Falconer*, 28 Mo., 23.)

II. The first instruction given at the request of defendants was proper. In substance that instruction declares, that he who is competent to the management and disposition of his property, in the ordinary course of business between man and man, has sufficient capacity to devise or bequeath it by will.

This must be true, unless greater mental capacity is needed to make a will than is necessary to acquire by deed the property devised. The general rule has been laid down much more strongly than the defendants have occasion to insist on. The whole subject is fully discussed in ch. 4, p. 120, of *Redfield on Wills*, and it is conceived that it is not possible to accept this authority, and to rise from the perusal of that chapter without the conviction that there is nothing artificial or abstruse in the general question of testamentary capacity; that indeed, in many cases, a will ought to stand, although the capacity of the testator for the active business of life be gravely impaired; but that when this capacity to deal and cope with his fellows exists, there can be no doubt of his having sufficient capacity to make a will, because the greater includes the less. "If one be able to transact the ordinary affairs of life, he may, of course, execute a valid will," says *Redfield*, (p. 125, § 9). He seems to think the question one of which there is no reasonable doubt. He cites in his notes several cases, *e. g.*, 1 *Bradford's Surr. R.*, pp. 360-362; *Burger vs. Hill*, and the cases cited by the surrogate from 26 *Wend.*, 255; 3 *Denio*, 37, and 2 *Comstock*, 498, and thinks that they perhaps go too far. Certainly they go much further than we need desire, and further than the sensible rule laid down in *Horne vs. Horne*, (9 *Iredell*, 99) and in *Converse vs. Converse*, (21 *Vermont*, 168).

The subject is not capable of mystification, unless principles of criticism, which are believed to be well settled, are overthrown and superseded by others having as yet no countenance from courts of justice. At p. 128, § 12, of ch. IV., Redfield sums up the matter in this clear and emphatic way: "Hence the general rule undoubtedly is, that a less degree of mind is requisite to execute a will understandingly than a contract; but in some of the States it has been held that the capacity to make a valid will and a contract is precisely the same." That is, the rule to which there is no exception, is, that whoever is competent to transact his ordinary affairs, of which the making of a contract is a simple example, is, *a fortiori*, competent to make a will. This is the general rule. Some States have gone further, (and the author agrees with them, they being a majority in number, and more reasonable in their conclusions in his opinion) in considering that one may be able to make a valid will, though not competent to make a binding contract. But everywhere it is conceded, that if a man has capacity to make an ordinary business contract, he has, beyond doubt, the capacity to make a valid will. Now this is all which the first instruction of defendants asserts.

III. The fifth instruction refused has faults of its own more than sufficient to warrant its refusal. It would have told the jury that the deed of 1849, by which half a million of dollars worth of property was settled on the children of Mr. Benoist then living, was "no advancement," and therefore the jury must disregard it. Was it really imagined that the jury was impaneled to make an equal or rateable distribution of Mr. Benoist's property among all his children? Was it this task or an answer to the question whether Mr. Benoist, when dividing his estate, was of sound mind, that they were sworn to perform? It was of no possible relevancy to the discharge of their duty, that the deed of 1849 should be distinguished by this or that technical name.

IV. The third instruction refused makes it a negation of a sound disposing mind, memory and understanding on the

part of Mr. Benoist, if, when he made his will, he did not remember each particular piece of his property, its situation, amount and value (for he is required to be capable of "estimating it," which means "stating its value," or else has no meaning at all). Now, every one knows that there is here an imposition on every large proprietor in this or any other city, which (if it be law) will disqualify every such person from making a will. Nay, it will disqualify every property holder, large or small, except such as have nothing but hard cash, and so every rich man must die intestate. For nothing conceivable is subject to greater variation than the estimates which different persons will put on the same property, whether this property be real estate or personal, improved and productive, or unimproved. But only one of these estimates can be, strictly speaking, correct, and the author of this particular estimate is the only person capable of estimating it correctly—that is, of estimating it at all, for of course if incorrect estimates are meant, we are talking and listening to nonsense. To estimate is, "to form an opinion of the value of anything." Any dunderhead, any booby, can form an erroneous opinion of such value, but only he who can form a correct opinion of it is able to estimate it in any proper sense. It follows that, in the opinion of the draftsman of this instruction, whoever cannot form a correct opinion from day to day, of the value of each and every piece of property which he holds, must be deemed incapable of making a will. Such a test would have disqualified all the counsel engaged, all the parties to the cause, and every witness. Let it not be said that this is not the fair meaning of the instruction. It is this or nothing.

V. Of his state of mind when making his will, what he there declares is the best criterion; and if any one in his senses will read that will, it will be as easy for him to come to the conclusion that Mr. Benoist believed himself to be the Emperor of China, as that he believed himself to be "financially ruined." He proclaims himself the proprietor of a country seat, which he gives to his widow for term of life,

devoting \$30,000 to the purpose of keeping it in good order, and declares that he has provided adequately for one family of children by a settlement which appropriates for that purpose half a million of property. He gives to his servants, who have served him faithfully, generous bequests, and to his eight children and widow he gives the bulk of his remaining fortune. The court could not have given the instruction asked to the jury, without insinuating to them that the man who thus expressed himself might, nevertheless, contrary to all evidence, have supposed himself a pauper—for that, I take it, is the meaning of the figurative expression “financially ruined,” employed by the draftsman. If it does not mean this the instruction will be vicious, as being couched in language calculated to mislead all the plain men on the jury.

J. Wickham, for Respondents:

I. It is well settled, that when one is able to transact the ordinary affairs of life, he is competent to execute a valid will. (Redf. Wills, 124, 125; *Tompkins vs. Tompkins*, 1 Bailey, 93; *Coleman vs. Robinson*, 17 Ala., 84.)

In point of fact it has been uniformly held, that a less amount of mental capacity than is required to enable a man to cope with the world at large, in contracts and in ordinary business transactions of every day life, will be sufficient to enable him to make a valid will; all that is necessary for this latter purpose, is that his mind and memory be sufficiently sound to make him know and understand the business in which he is engaged at the time. (*Dunham's Appeal*, 27 Conn., 192; *McClintock vs. Curd*, 32 Mo., 411; *Harrison vs. Rowan*, 3 Wash., C. C., 536; *Keime vs. Keime*, 9 Conn., 105; *Stubbs vs. Houston*, 33 Ala. 567; *Converse vs. Converse*, 21 Vt., 168.)

II. Great fault is found by the counsel for the plaintiff with an alteration made by the court below in one of the instructions asked on their behalf, to the effect that the false opinions supposed to have been entertained by the testator “solely” determined the disposition of his property; but the

Benoist, et al. v. Murrin, et al.

best considered cases seem to hold, that, in order to render it invalid, the will must be shown to be the result and direct offspring of the false or exaggerated opinions. (*Redf. Wills*, 85, 86; *Dunham's Appeal*, 27 Conn., 172; *Morgan vs. Bogs*, Taylor's Med. Jur., 657; *Thompson vs. Quinby*, 2 Bradf., 449, 588, 589; 21 Barb., 107, 112; *James vs. Langdon*, 7 B. Monroe, 193, 198.)

If this opinion was founded upon the evidences of his financial condition and his knowledge and opinion of the value of his estate, and not upon delusion, it can have no effect to invalidate his will. (*Capp vs. Fullerton*, 34 N. Y., 190; *Falleck vs. Atkinson*, 3 Hogg Ec. R., 527.)

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding on the part of the plaintiffs to contest the will of Louis A. Benoist, on the ground that at the time he executed it he was laboring under an insane delusion, and that undue influence was exercised over him. The will is dated on the 7th of August 1866, at St. Louis, Mo., and about the 1st of December, 1866, the testator left that city for Cuba, and died in the city of Havanna, during the month of January, 1867. The will was admitted to probate on the 4th of February, 1867, and letters testamentary were granted to two of the executors therein named. It seems that Mr. Benoist was thrice married. By his first wife he left no children. By his second wife, who died in 1848, he had two sons and three daughters. In 1849 he again married and his last wife survived him. By her he left five sons and four daughters. By a deed dated November, 1849, he conveyed to trustees real property considered to be worth \$500,000, for the use of himself for life, and then to the use of his five children by his second marriage and their heirs, in fee. To the daughters a life estate was given, with remainder to their heirs.

By his will Mr. Benoist gave to his wife certain property for life, which he declared should be in addition to dower and not in lieu thereof. The second clause of his will was in the

Benoist, et al. v. Murrin, et al.

words following: "Whereas I consider that I have amply already provided for all my other children than those begotten of my said wife, I therefore give to each of my children not begotten of my said wife, the sum of one hundred dollars, the same going to the descendants of such as may be dead at my decease, and no more." Subject to the above mentioned exceptions, he gave all the rest of his property to the children by his last wife.

He left an estate valued at \$1,500,000, and his alleged insanity consisted in his believing himself poor, that the failure of his son had ruined him and that he was impoverished financially. In 1869, this proceeding was instituted to set the will aside, and two grounds therefor were alleged; first, that when he executed it, Mr. Benoist was not of sound mind; second, that he executed it under undue influence, exercised by the defendants and other persons, and under a delusion and mistake as to the value of the property he had given to the children of his two marriages. The answer denied every allegation in the petition; denied that the testator was of unsound mind, or that he was unduly influenced, or that he was under delusion; and averred that the will was executed understandingly and deliberately, after full consideration, without undue influence from any source, free from all delusions; and that he was of sound and disposing mind, memory and understanding.

When the case was called for trial, the plaintiffs filed a paper by which they admitted that the signature of the will by Louis A. Benoist and the subscribing witness was genuine, and that the will must stand, unless the plaintiffs should satisfy the jury, either that the will was procured by undue influence, or that the testator was of unsound mind when he executed it, or that he executed it under mistake and delusion; and thereupon they moved the court to award to them the opening and the close of the evidence and argument. This motion the court overruled and the plaintiffs excepted.

On the part of the defendants witnesses were then examined, who testified to the sound judgment, memory and busi-

ness capacity of the deceased down to the time of his departure for Cuba. The plaintiffs introduced and examined witnesses whose testimony tended to support the allegations contained in the petition.

The plaintiffs asked certain instructions which the court refused to give, but made some alteration in the following two, and then gave them of its own motion : 1st. "If the jury believe from the evidence, that on the 7th day of August, 1866, Louis A. Benoist was erroneously of the opinion that he was in danger of insolvency, or erroneously believed that he was financially ruined, or erroneously believed that he had already made more ample provision for his older children than he was able to make for the children of his last wife, and, by reason of such erroneous belief, made the instrument in dispute; or if the jury believe from the evidence that said Benoist, on the 7th day of August, had no definite or accurate knowledge of the amount or value of his property, and, by reason of said want of knowledge, executed the instrument in question; or if the jury believe from the evidence that at said time he was in such a bodily and mental condition as not fully to understand and comprehend with reasonable certainty the state and condition of his property, and the true state and condition of his children, any and all of these facts may be considered by the jury as indicative of his mental condition, and from them it may be inferred that Benoist was not of sound and disposing mind on said day."

2nd. "If the jury believe from the evidence, that at the time Louis A. Benoist signed the paper, purporting to be his will, he was possessed with a false and exaggerated opinion and estimate of the value of the property he had previously settled upon the children of his second wife; and was also laboring under a false and mistaken opinion of the nature and character of such settlement, and of the estates thereby created and vested in said children; and if they also find that at the same time he was possessed of a false and exaggerated opinion and belief of the smallness of the amount and value of the property which he then possessed, and of

the large extent of the losses he may have sustained through his son Sanguinet H. Benoist, and of the ruinous effects of such losses upon his estate, which false opinions and belief he was incapable of divesting himself of, but acted on them, in executing the said instrument, as being true ; and that these false opinions solely determined the disposition of his property, contained in said instrument, then the jury ought to find that said instrument was signed by him under a delusion and mistake ; and that it is not the last will and testament of said Louis A. Benoist."

At the request of the defendants, the court declared the law as follows : 1st. "The jury is further instructed that testamentary capacity, or possession of sufficient mind to enable a man to make a will, is like the capacity to attend to his own affairs, if his bodily health permitted his attention to them. No man who is competent, mentally, to transact his ordinary business can be pronounced incapable of making a will, and unless the jury believe from the evidence, that Louis A. Benoist at the time of making his will (7th August, 1866), was of unsound mind and incapable of managing his affairs, they must find that the paper produced is his will, provided always that they believe that his signature and the signatures of the subscribing witnesses are genuine ; and that the matters stated by the witnesses in the certificate of attestation are true. 2nd. The court instructs the jury that by the deed of L. A. Benoist, dated November 20th, 1849, to trustees for his five children, read in evidence, an estate for life was vested in each of his daughters therein mentioned, and it was competent for each of his daughters to sell her interest in the property named in said deed if she chose to do so, there being no prohibition in the deed against such sale."

The instructions in reference to undue influence, I pass by, as there is in fact no such question in the case, there being no evidence to sustain the allegation, and it is not seriously contended for here. It is strongly insisted, however, that the court erred in rejecting the third instruction offered by the plaintiff, defining what constitutes a sound and dispos-

ing mind and memory, and I will transcribe it. It is as follows: "The jury ought to find that the instrument probated as the last will and testament of Louis A. Benoist, and in evidence in this case, was not the last will and testament of said Benoist, unless they find from the evidence that at the time the same was executed by him, he was possessed of a sound and disposing mind and memory. Sound signifies whole, unbroken, unimpaired, unshattered by disease or otherwise. Disposing mind and memory is a mind and memory capable of recollecting all the testator's property, and its amount, condition and situation, and of estimating it, and dividing it out; and of comprehending the scope and bearing of the provisions of his will; and also of discussing and feeling the relations, connections and obligations of family and blood; and of recollecting all the persons who come reasonably within the range of his bounty; and also all he had previously done for any and each of them; and also the number, condition and circumstance of those who are the proper object of his bounty; and also of weighing their deserts with respect to conduct, capacity and need, remembering all and forgetting none."

No further notice of the instructions need be taken, as these already given show the theory on which the court tried the case, and the others, which were refused, either stated the same propositions in different language, or they were entirely unnecessary.

As to the action of the court in awarding the opening and close of the evidence and argument to defendants, who were the proponents of the will, there was no error. It must now be considered as finally settled in this court, that where the issues are made up, and the defendants are endeavoring to establish or hold under a will, they affirm that the paper writing is the last will of the testator, and they have the affirmation of the issue to be tried, and they are entitled to the opening and conclusion. (See *Harvey vs. Sulen's Heirs*, 56 Mo., 372.)

The position now taken by the counsel for the appellants is that as they admitted the genuineness of the signatures of the testator and the witnesses to the will, that, therefore, the rule was changed. But they did not admit the sanity, or the sound and disposing mind of the testator, which was the main point in issue, and until that fact was satisfactorily established by the defendants, they had not made out their case and showed a good and valid will. This question was thoroughly considered in *Delafield vs. Parish* (25 N. Y., 9), and as the result of the authorities it was held, that in all cases the party propounding the will is bound to prove to the satisfaction of the court that the paper in question does declare the will of the deceased; and that the supposed testator was, at the time of making and publishing the document propounded as his will, of sound and disposing mind and memory; and that this burden is not shifted during the progress of the trial, and is not removed by proof of the *factum* of the will and the testamentary competency by the attesting witnesses, but remains with the party setting up the will.

A disposing mind and memory may be said to be one which is capable of presenting to the testator all his property, and all the persons who come reasonably within the range of his bounty, and if a person has sufficient understanding and intelligence, to understand his ordinary business, and to understand what disposition he is making of his property, then he has sufficient capacity to make a will. (*Harvey vs. Sullen's Heirs, supra.*) In *McClintock vs. Curd*, (32 Mo., 411,) the most satisfactory test was declared to be, whether the mind and memory of the testator were sufficiently sound to enable him to know and understand the business in which he was engaged at the time he executed the will. The Supreme Court of Vermont in the case of *Converse vs. Converse*, (21 Vt., 168) lays down the doctrine that if the deceased was, at the time, capable of understanding the nature of the business and the elements of the will, that is, the nature and extent of his property and the persons to whom he meant to convey it, and the mode of distribution, it is sufficient; and in *Horne vs. Horne*, (9 Ired.,

99,) it is said, it is sufficient if the testator knew what he was doing, and to whom he was giving his property.

In 1 Redf. Wills, (p. 125, pl. 9,) it is declared that if one be able to transact the ordinary affairs of life, he may of course execute a valid will; and in *Harvey vs. Sullen's Heirs* substantially the same rule was announced in this court.

The definition, as to what constitutes a sound and disposing mind and memory, contained in the third instruction of the defendants, which was refused, was copied almost literally from the charge of the chief justice in *Den vs. Johnson*, (2 South., 454).

There after explaining to the jury the meaning and import of the word "sound" by itself, he went on and said, that a disposing mind and memory was a mind and memory which had the capacity of recollecting, discerning and feeling the relations, connections and obligations of family and blood. The whole charge, taken together, was approved in the Supreme Court, but it was intimated, that, in describing the force of the word "sound" itself, too strong language was used.

In the present case, it is not pretended that the deceased was affected with general insanity, but that he was a monomaniac, and laboring under a particular delusion. He seems to have had excellent business capacity, and managed his estate with skill and vigilance, and we see no objection to the courts confining the instructions to the special trait in issue.

It is, moreover, urged, that the court erred in declaring, that, in order to render the will invalid, it was necessary to find that the false and exaggerated opinions entertained by the deceased, in reference to the amount and smallness of the value of his property, and the losses he had sustained by his son, solely determined the disposition that he made of his property in that instrument. The correct principle is, that whenever a person imagines something extravagant to exist, which really has no existence whatever, and he is incapable of being reasoned out of his false belief, he is in that respect insane; and if his delusion relates to his property, he is then incapable of making a will.

But to invalidate the instrument it must be directly produced by the partial insanity or monomania under which the testator was laboring.

In the case of *Boyd vs. Eby*, (8 Watts., 71,) the court say: "If the erroneous and groundless impressions, received during the time of this delirium, shall retain their hold, whether by some physical derangement of the brain, or by some indelible stamp on the thinking faculties, that person must be considered still under delirium—the effect continues, and it is only by effects that we can judge of the existence of the exciting cause—and if he is under a delusion, though there be but a partial insanity, yet if it be in relation to the act in question, it will invalidate contracts generally, and will defeat a will which is the direct offspring of that partial insanity."

A learned writer on Medical Jurisprudence, thus states the rule in regard to pronouncing an instrument void by reason of delusion. "The validity of deeds executed by persons affected with monomania, often becomes a subject of dispute. The practice of the law here indicates, that the mere existence of a delusion in the mind of a person does not necessarily vitiate a deed, unless the delusion form the ground work of it, or unless the most decisive evidence be given, that at the time of executing the deed, the testator's mind was influenced by it. Strong evidence is often derivable from the act itself, more especially where a testator has drawn it up of his own accord. In the case of *Barton*, (July, 1840,) the Ecclesiastical Court was chiefly guided in its decision by the nature of the instrument. The testator, it appeared, labored under the extraordinary delusion that he could dispose of his own property to himself and make himself his own legatee and executor. This he had accordingly done. The instrument was pronounced to be invalid. But a will may be manifestly unjust to the surviving relatives of a testator, and it may display some of the extraordinary opinions of the individual, yet it will not necessarily be void, unless the testamentary dispositions clearly indicate that they have been formed under a delusion. Some injustice may possibly be done by the rig-

orous adoption of this principle, since delusion may certainly enter into a man's act, whether civil or criminal, without our being always able to discover it; but after all it is, perhaps, the most equitable way of construing the last wishes of the dead." (Tayl. Med. Jur., 656.)

Lord Brougham, in an important case before the Privy Council, (*Waring vs. Waring*, 6 Moore, P. C. Cas., 349,) advanced the remarkable position, that any person laboring under delusion or monomania, to any extent or upon any subject, was not to be regarded as competent to execute a valid will. But this singular and extraordinary ground has not been followed in England, and has received no countenance in the American Courts.

The main question in the case here was whether the testator's mind was affected, and in consequence of a monomania or delusion, he was therefore incapable of executing a valid will. That he possessed good business habits and was able intelligently to transact his ordinary affairs, the testimony leaves no doubt. If, then, any incapacity existed, it resulted from the delusion, which it is alleged he was laboring under. But the two instructions given by the court on its own motion, covered this whole question, and were entirely unexceptionable, and as favorable as the plaintiffs had any right to demand. It is evident that under these instructions, the jury must have been fully convinced from the evidence, that the testator was entirely sane, and not affected with either delusion or monomania. The remaining instructions were not only unnecessary, but some of them asserted incorrect propositions of law. The 5th instruction which told the jury that the deed made by Mr. Benoist in 1849, by which he settled a half a million of property on his children, then living, was no advancement, was rightly refused. It had nothing to do with the duty with which the jury were charged, namely, to ascertain the sanity or insanity of the deceased. It was not one of the functions of the jury to make a ratable or equal distribution of the property. Besides, in some of the refused instructions, the language of the will is misapplied.

The language of the testator expressed in the will is: "I consider and believe, that I have amply, already, provided for all my other children than those begotten of my said wife. I therefore give to each, etc." As to whether the provision made for the elder children by a former wife was ample, the testator was the sole and exclusive judge. No appeal would lie in respect to that matter to the courts.

Whether he had any idea of equality in reference to the distribution, was immaterial. He was not bound to distribute equally among the heirs. The civil law which prohibited parents from disinheriting their children, unless for good cause, does not obtain under our system of jurisprudence; under the common law, disinheritance or discrimination may take place without assigning any reason.

The will certainly does not bear any internal evidence that the testator considered himself ruined, or that he had forgotten any one who had claims on his bounty. His valuable country seat he expressly names and gives to his widow for her life, and then sets apart \$30,000 to keeping it in good order. He declares that he has already adequately provided for a part of his children, and that he gives the remaining portion of his property to the rest. To invalidate the will it was necessary to show something extraneous, and the only pretense was, that the testator was affected with delusion, but after hearing evidence on the question, and acting under fair instructions, the jury have found that no delusion existed. That verdict is final. Upon a full review of the whole case, we can find no reason for interfering with the judgment.

All the judges concur, except Judge Napton, not sitting.

Shelbina Hotel Association v. Parker.

SHELBINA HOTEL ASSOCIATION, Respondent, vs. GEORGE J.
PARKER, Appellant.

1. *Practice, civil—Res adjudicata—Subsequent proceedings—Laches.*—Where a party to an action, being fully apprised of his rights, suffers judgment to go against him when he might, by the exercise of reasonable diligence in making his defense, prevent a recovery of the amount claimed, either in whole or in part, he cannot, in a subsequent proceeding, at law or in equity, be allowed to re-agitate questions which were, or should have been, adjudicated at the former trial.
2. *Arbitration and award—Confirmation, effect of.*—Section 17 of the act concerning arbitrations and awards (Wagn. Stat., 145) imparts to a judgment of confirmation of such award equal force with judgments in ordinary actions; and such a confirmation is fully as conclusive as though the judgment had been obtained in an action on the award.

Appeal from Shelby Circuit Court.

Anderson & Boulware, for Appellant.

I. The judgment of the court on the award is a complete bar to plaintiff's action herein: 1st—Said judgment had the same force and effect that a judgment in an action of debt upon the award would have had. (Wagn. Stat., p. 145, § 17; G. Stat., ch. 198, § 17.) Any matter which at law or in equity would constitute a defense to an action on the award, might have been set up in the proceeding under the statute by motion. (Field vs. Oliver, 43 Mo., 201.) Nor does it admit of doubt that, under our practice, any state of facts which in equity would be ground for setting aside and vacating an award in a direct proceeding for that purpose, may be set up in defense to an action on the award. (Valle vs. N. Mo. R. R. Co., 37 Mo., 450; Hyeroniums vs. Allison, 52 Mo., 102; Gen. Stat. Mo., ch. 165, § 13.)

II. The award was merged in and extinguished by the judgment. (Freem. Judgm., § 215, *et seq.*, and authorities cited.)

III. The award and the rights of the parties growing out of it have passed "*in rem adjudicatam*." The judgment, until reversed by a superior court, is conclusive between the parties as to their rights. It concludes the defendant therein

as to every matter which was open to him as a defense. *Interest reipublicæ ut sit finis litium.*" (Aurora City vs. West, 7 Wall., 102; Homer vs. Fish, 1 Pick., 435; Freem. Judg't, § 215, *et seq.*; §§ 286-289, and authorities cited; Donahue vs. Prentiss, 22 Wis., 311; Beloit vs. Morgan, 7 Wall., 621; Sheets vs. Selden, 7 Wall., 423; Binck vs. Wood, 43 Barb., [N. Y.], 315; Bobi's heirs vs. Stickney, 36 Ala., 482.)

IV. The fact averred as the gravamen of the action was known to plaintiff before the proceeding was had on the award, and a failure to set it up would be such negligence as would cut off any right he might otherwise have to maintain an action to set aside the judgment. This would be true if the fact averred was fraud instead of mistake, and if it were true that fraud or mistake in the original transaction was ground for setting aside the judgment in a direct proceeding in equity for that purpose.

V. It is well settled, that money paid under a judgment cannot be recovered back in a new suit, grounded on any matter that would have been a defense to the former action. (Marriot vs. Humpton, reported in Smith's Lead. Cas., vol. 2, top p. 333, side p. 237; and the notes thereto both English and American, and the authorities therein cited; Homer vs. Fish, above cited; Freem. Judg't, and the authorities above referred to.)

Dryden & Dryden with Chas. M. King, for Respondent.

I. The petition though not formally a bill, is nevertheless substantially a bill in equity to set aside the award for mistake. Upon the facts of the case the plaintiff was relievable in equity. (Valle vs. N. Mo. R. R. Co., 37 Mo., 451; 2 Greenl. Ev., § 78; Sto. Cont., §§ 985, 986; 2 Parson's Cont., pp. 701-4; 2 Sto. Eq. Jur., § 1456.)

II. It was competent to establish the mistake by the testimony of the arbitrators. (Valle vs. N. Mo. R. R. Co., *supra*; 2 Greenl. Ev., § 78.)

III. The judgment in this case is so palpably for the right party that the court will not reverse for merely technical considerations.

Shelbina Hotel Association v. Parker.

SHERWOOD, Judge, delivered the opinion of the court.

The judgment in this case must be reversed on two grounds:

First, the petition which seeks to recover \$172.80, from the defendant, on account of a mistake made to that extent by the arbitrators, who were selected by the parties to settle a question of difference between them respecting the building of a hotel for the plaintiff by the defendant, and the amount of money yet remaining unpaid to him on the contract, shows upon its face, that the plaintiff was made aware of the mistake by the arbitrators, soon after they had signed and before they had delivered their award, and that, notwithstanding this information, the plaintiff permitted the award, without objection, to be confirmed under the provisions of the statute by the judgment of the Circuit Court, and subsequently satisfied the execution issued on such judgment. At the trial, the introduction of any evidence was objected to on the ground that the petition did not state facts sufficient to constitute a cause of action, and in thus objecting, the defendant was undoubtedly right. After the numerous adjudications on this point, it ought to be regarded as settled, that where a party to an action, being fully apprised of his rights, suffers judgment to go against him, when he might, by the exercise of reasonable diligence in making his defense, prevent a recovery of the amount claimed, either in whole or in part, he should not be allowed in a subsequent proceeding to re-agitate questions which either were, or else would have been, adjudicated at the former trial, but for his inexcusable neglect.

And in this regard, courts of law, as well as courts of equity, pursue the same wise policy, and concur in the application of the same enlightened maxims. (Freem. Judg'ts, § 249 and cases cited; 2 Sto. Eq. Jur., §§ 895, 895a, 896, and cases cited; Greatheart vs. Brownley, 7 T. R., 455; Aurora, City vs. West, 7 Wall., 82, and cases cited; Duncan vs. Gibson, 45 Mo., 352 and cases cited; Valle vs. N. Mo. R. R., 37 Mo., 445; Bateman vs. Willoe, 1 Sch. & Less., 204; Smith vs.

Lowry, 1 Johns. Ch., 322; Smith vs. Lewis, 3 Johns., 157; Peck vs. Woodbridge, 3 Day, 36; Mariott vs. Hampton, 7 T. R., 269; Homes vs. Avery, 12 Mass., 137; *Id.*, 268; State vs. Coste, 36 Mo., 437; Doty vs. Brown, 4 Comst., 71; Gardner vs. Bucklee, 3 Cow., 120; Ketchen vs. Campbell, 3 Wils., 304; Miles vs. Caldwell, 2 Wall., 35; Primm vs. Raboteau, 56 Mo., 407.)

That the plaintiff had ample time and opportunity to move to modify the award in the particular referred to, and thus obviate the mistake into which the arbitrators had fallen, is clearly shown by the petition; and section 10, *et seq.*, of the statute, respecting arbitrations and references, makes full provision for the correction of an error of this sort, giving a party desirous of doing so, until the "next term after the publication of the award" in which to move for redress of the grievance complained of.

And section 17 of that act imparts to a judgment of confirmation, rendered in accordance with the provisions of the law referred to, equal force and validity as that possessed by judgments in ordinary actions, and makes them fully as conclusive as though that judgment had been recovered in an action on the award. The effect then, of the judgment mentioned in the petition, was to merge the award in such judgment, so that, whether the present proceeding is to be regarded as one in the nature of a bill in equity to set aside the award, or as an action for money had and received, the petition utterly fails to state any ground for relief in equity, or recovery at law; showing as it does, a judgment of the same court, between the same parties, in respect to the same subject matter, unreversed, and that the present suit is brought to recover the amount of the excess of that judgment, and that such excess consists of, and was caused by the before mentioned mistake, which, but for plaintiff's own laches, would never have formed a part of the judgment. Under such circumstances, it would be outside of all precedent, for either a court of law or a court of equity to afford any redress. (See above cited authorities.)

Muldrow v. Robison.

Again, aside from the absence of any statement of a cause of action in the petition, a fault equally fatal to plaintiff's case, is met with in the undenied statements of defendant's answer, pleaded as a bar to the action, showing that the motion of the plaintiff to modify the award with regard to the same mistake on which the present suit is based, and the motion of the defendant to confirm the award, being heard together, the former motion was overruled, and the latter sustained, and a judgment of confirmation entered accordingly; and that the same was in full force. It thus stands admitted of record that the very point in controversy, and between same parties, had received adjudication in a former action; the validity of the judgment then rendered, remaining unquestioned. And besides this, the attention of the court, before the introduction of testimony, was expressly called to this state of the pleadings, so that whatever may be thought of the necessity of such action on the part of a party pleading new matter, which is not denied, it is sufficient to observe, that defendant fully complied with any such supposed necessity. And the authorities heretofore cited, are fully applicable also to the issues raised by the new matter contained in the answer.

Judgment reversed; all the judges concur.



WILLIAM C. MULDROW, Appellant, vs. DAVID M. ROBISON,
Respondent.

1. *Evidence—Powers of attorney affecting land—Record of certified copies under § 40 of act touching evidence—Notice—Secondary proof, etc.—Const. Stat.*—The 40th section of the statute relating to evidence, providing that certified copies, taken from county records, of "any writing, instrument or deed purporting to affect any real estate or any right or interest in the same," may be used in evidence under certain circumstances, was intended to embrace powers of attorney for the conveyance of land. But under that statute the record of such instrument can impart notice, and certified copies can be used as secondary proof of the original, only as to land situated in the county where the power of attorney was recorded. But such copy may be read in

Muldrow v. Robison.

evidence to prove notice in fact, where the party is shown to be in possession of facts such as would have caused a man of ordinary prudence to examine the records where the instrument had been recorded.

2. *Evidence—Notice, actual, question of fact*—The question of actual notice is one of fact, and to be determined like any other fact.
3. *Evidence—Notice—Facts which put on inquiry*.—One will be held to have notice of facts which would have been ascertained by a man of ordinary prudence and diligence.

Appeal from Shelby Circuit Court.

Anderson & Boulware with Manville & Burlingame, for Appellant.

1. The language in section 40, (Wagn. Stat., 596) to-wit: "Any writing, instrument or deed, purporting to affect any real estate or any right or interest in or to the same," is descriptive of an instrument which of its own force operates either in law or in equity on the title, and does not include within its terms any other. (Patterson vs. Fagan, 38 Mo., 83.) A naked or common power of attorney is not such an instrument. The extent of its operation is the appointment of an agent, and it is revocable at the pleasure of the principal; it is revoked *eo instanti* by his death. Said section 40 is "*in pari materia*" with the Recording Act and should be construed as part thereof. Upon this rule rests the construction given to said section by this court in Garrison vs. Barry, (28 Mo., 449, 450). The language used in section 24 of the Recording Act (Wagn. Stat., 277), "Every instrument in writing, whereby any real estate may be affected in law or equity," is of the same import as that used in said section 40 of the act concerning evidence. That the language used in said section 24 of the Recording Act was not understood or intended by the legislature to include common powers or letters of attorney, is made manifest by the fact that special provision is made for letters of attorney in section 27 immediately thereafter following; and by the further fact, that by the very language of said section 27, "Every instrument whereby real estate may be affected in law or equity," is placed in manifest contradistinction to

Muldrow v. Robison.

"Every letter of attorney or other instrument containing a power to convey real estate as agent or attorney."

The proposition that sections 24, 25, and 26 of the Recording Act were not intended to embrace common powers of attorney, is further strengthened by the consideration that said sections were first adopted in Revised Code of 1835, (§ 30 *et seq.*, p. 123) in lieu of section 13 *et seq.* of Revised Code of 1825, p. 221, and that said section 21 of the Recording Act, (R. S. 1865) was first adopted in Revised Code of 1835, in lieu and place of section 15 of R. C. 1825, p. 221. In the Code of 1825 the instruments, for the recording of which provision is made, are specifically named, and each one operates either in law or in equity by its own force upon the title.

In place of the specific enumeration of instruments as in Code of 1825, we now have in said section 24 general language descriptive of the same instruments. The same remark is true with reference to the relation sustained by section 27 of the present law to said section 15 of the Code of 1825. Sections 29 and 30 of the present Recording Acts can apply to powers of attorney in one state of facts only, and that is where the power of attorney is made part of the deed, and as such recorded with it.

II. If it should be held that section 40 embraces powers of attorney within its terms then said section is to be construed in connection with sections 24, 25 and 26 of said Recording Act, and as operating only on records made in compliance therewith. (*Garrison vs. Barry*, 28 Mo., 449.) Said section 40 applies to the record of the county where the land is situated.

III. Open and notorious possession of land is not notice, to subsequent purchasers, of the occupant's title, even if knowledge of such possession be brought home to such purchaser. If the purchaser had knowledge of such possession, it may be, that from that fact a presumption of notice will arise. Even then it is a presumption of fact, and not of law, and like all other presumptions of fact may be rebutted by showing the truth. It may also be that the fact of open and

notorious possession will raise the presumption (of fact) that the purchaser had knowledge of such possession. If this be true, it is also true that this presumption may be rebutted. The possession, to have any force as evidence tending to prove actual notice, must be an open and notorious possession. (Vaughn vs. Tracy, 22 Mo., 417; Vaughn vs. Tracy, 25 Mo., 320; Beattie vs. Butler, 21 Mo., 313; Maupin vs. Emmons, 47 Mo., 304.) In this case there was no such possession.

IV. Neither the recording of the alleged power of attorney from William Muldrow to John Muldrow, in Marion county, nor the recording in Shelby county of the alleged deed from William Muldrow by John Muldrow to Gray, operated to give plaintiff constructive notice of the alleged title of defendant.

Manville & Burlingame, for Appellant.

I. The copy offered is not a transcript from the records at Shelby county, in which the land is situated, (Wagn. Stat., 277, §§ 24, 27, 30) and its admission was not authorized by law. It is not a transcript of a record in the meaning of the statute. No such paper spread upon the books is a record, except as to lands in the county in which it is recorded. (Gwynn vs. Frazier, 33 Mo., 90.)

II. The existence of an executed original had not been proved. "The best evidence of which the case is susceptible, must be produced," and secondary evidence of the contents of a deed "was inadmissible without proof of the previous existence and loss of the deed." (Smith vs. Phillips, 25 Mo., 557; Gould vs. Trowbridge, 32 Mo., 293; Atwell vs. Lynch, 39 Mo., 519; Dail vs. Moore, 51 Mo., 590; Briggs vs. Henderson, 49 Mo., 533.)

III. But even if defendant had produced in evidence the original power of attorney, of which the paper offered purports to be a copy, he must fail in his defense, under the provisions of the registry law, for want of legal notice. (Wagn. Stat., 277, §§ 24, 26, 27; Thornton vs. Miskimmon, 48 Mo., 223; Bowman vs. Lee, *Id.*, 336; Terrell vs. Andrew County, 44 Mo., 312; Aubuchon vs. Bender 44 Mo., 564; Youngblood vs. Vastine, 46 Mo., 243.)

IV. Section 27, page 277 of Wagner's Statutes, places letters of attorney upon the same footing with "other instruments of writing, conveying or affecting real estate." The original power of attorney not having been recorded, the question arises, did plaintiff have "actual notice thereof." The burden of proof of the fact of notice rested on the defendant.

V. There is no evidence that plaintiff had notice of any of the facts given in evidence, and relied on as proof of notice; but a knowledge of these facts brought home to plaintiff would not constitute actual notice. Plaintiff had no knowledge of any fact that would prompt him to inquire about the title to the land.

VI. By giving instruction No. 3 and refusing No. 1, the court virtually declared, that the power of attorney might be "properly recorded" without being recorded in the county in which the real estate to be affected thereby is situate. This would render nugatory section 24 of the Registry Act.

J. C. Hale, for Respondent.

I. The certified copy of Marion Co. record of power of attorney of William Muldrow to John Muldrow and the deed made thereunder to M. L. Gray was properly admitted in evidence, it being shown by the testimony of the plaintiff, that William Muldrow (the father and grantor of plaintiff) was, at the time of the record of said power of attorney in Marion county, residing on, and claiming as his own, certain lands in Marion county; and it being further shown that the said original power of attorney was beyond the reach and control of defendant, and that he, defendant, through his agents and attorney had made necessary effort to obtain same. (Wagn. Stat., ch. 54, § 40, Ed. 1872.)

II. The whole question here turns upon the power of John Muldrow to convey, and upon the notice plaintiff had of defendant's claim under such power; and the certified copy is *prima facie* evidence of the execution of said instrument. Plaintiff might have introduced testimony to show that

original was never executed, or that the copy offered in evidence was not a true copy. (Wagn. Stat., § 34, ch. 54.)

III. Proof of actual knowledge is not necessary, but the jury may infer it from knowledge of facts that naturally suggest it. (47 Mo., 304.) Notice is actual where the purchaser either knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them. (40 Mo., 405; 48 Mo., 219-222-3; 35 Mo., 71.)

IV. Possession is not actual notice as a matter of law, but is competent to go to the jury, on which, if satisfied, they may find actual notice. (22 Mo., 415; 25 Mo., 318; 3 Washb. Real Prop., 283-4.) If the plaintiff bought the lands in dispute with a knowledge of his father's former transactions in sale of lands in north-east Missouri, and with the fact staring him in the face that defendant had told him that M. L. Gray of St. Louis owned them, he had sufficient notice to put him on his inquiry, and if he bought without further inquiry he bought with actual notice. (4 Mo., 62-66.)

M. L. Gray, for Respondent.

I. The deed of Wm. Muldrow (by John Muldrow, his attorney in fact,) and his wife to M. L. Gray, was so executed and acknowledged as to entitle it to be recorded. (Wagn. Stat., pp. 273, 274, 275, §§ 7, 9, 13, 24.) By section 29 of same act it was entitled to be read in evidence.

II. The deed of Wm. Muldrow to M. L. Gray was notice to all the world of its contents. (Wagn. Stat., p. 277, § 25; 10 Mo., 34; 47 Mo., 374.)

III. The action of the court in admitting the certified copy of the power of attorney from Wm. to John Muldrow was correct. A deed purporting to be the deed of Wm. Muldrow by John Muldrow, claiming to be his attorney in fact, had been recorded in 1850. And of this deed plaintiff had full notice; *i. e.* the fact of its acknowledgment and record was, as we have shown, notice to him of its contents. In the certificate of the acknowledgment of said deed, the clerk states

he knows that John Muldrow is attorney in fact of Wm. Muldrow from a power of attorney recorded in his office in Marion county, Missouri. This statement was equivalent to a reference to the book and page in Marion County Records, where said power of attorney could be found. Now, if the officer, in his certificate, had referred to the book and page of the record in Marion County, Missouri, where the power of attorney was recorded, would that not have affected plaintiff with notice of it?

IV. But the action of the court in admitting the certified copy of the power of attorney, is to be viewed entirely independent of any question of notice to plaintiff. Plaintiff had notice by law of the deed of Wm. Muldrow by John Muldrow, recorded in Shelby county in 1850, and thereby had notice that it was claimed that a power of attorney existed. To give operation to the deed of William Muldrow by John Muldrow, attorney in fact, it was only necessary to prove that John Muldrow had authority to make that deed. If he had authority to make it the deed was the deed of Wm. Muldrow against all the world. That John Muldrow had authority to make this deed in the name of William Muldrow to M. L. Gray was just the fact, and the only further fact that defendant needed to prove to show an older and better title in himself from Wm. Muldrow than in plaintiff. If he could have produced the original power of attorney from Wm. to John Muldrow, though it had never been recorded anywhere, he would have shown the necessary authority in John Muldrow to make the deed of 19th June, 1850, and thereby, made said deed binding and operative. Defendant could not produce the original, but he showed searches for it in Marion county, Missouri, where Wm. Muldrow resided when he made it; and in Ralls county where the attorney resided at the date of it, he showed a further search among the papers of the deceased, John Muldrow, etc., and thereby proved his inability to produce it. This entitled the defendant to introduce a certified copy of the power of attorney. (Wagn. Stat., p. 278, § 30 of act concerning Conveyances.)

V. This copy was as competent from the records of Marion county, Mo., as from the records of Shelby county, Missouri. The proof shows that in 1849, (Feb'y) when the power of att'y was executed, Wm. Muldrow lived and owned lands in Marion county. Its recording there was then legal and proper. The power of attorney was an authority to convey Wm. Muldrow's lands anywhere in Missouri.

NAPTON, Judge, delivered the opinion of the court.

This was an action of ejectment to recover a quarter section of land in Shelby county.

On the trial the plaintiff read in evidence a patent for the land in controversy, from the U. S. to Wm. Muldrow, dated Nov. 2, 1837, and a deed from Wm. Muldrow to himself, dated Oct. 4, 1872, and proved the possession of the defendant.

The defendant then read in evidence a deed to the same land from M. L. Gray and wife to himself, dated August 12, 1872. The defendant then offered to read a deed from Wm. Muldrow, by John Muldrow, his attorney in fact, to M. L. Gray, dated 19 June, 1850. The certificate of acknowledgment on said deed was made by the clerk of the Circuit Court of Marion county. This certificate was in the usual form, and contained the additional statement that "said John Muldrow was not only known to the officer to be the person who executed the deed, but also as the agent and attorney in fact of Wm. Muldrow, by virtue of a power of attorney, duly recorded in his office, and who acknowledged that he executed and delivered the foregoing instrument of writing, and declared it to be his act and deed, as the attorney in fact of Wm. Muldrow." This acknowledgment was dated also on the 19th of June, 1850.

There was also a certificate of acknowledgment of the wife of Wm. Muldrow, taken on the 12th of July, 1850, which is in due form and certified to by the same officer, the clerk of Marion county, at his office in Palmyra. This deed, thus acknowledged, was filed on the 17th of July, 1850, in the re-

Muldrow v. Robison.

corder's office of Shelby county, and the following is the certificate of the clerk: "State of Mo., County of Shelby, ss. I, William H. Vamort, clerk of the Circuit Court, and *ex officio* recorder, within and for the county of Shelby, aforesaid, hereby certify that the foregoing deed, together with the two certificates thereon, was received and filed for record on the 17th day of July, 1850, and that they have been duly recorded in my office in book E, for recording conveyances, etc., at pages 497, 498. Witness my hand, &c."

The defendant then offered in evidence an instrument purporting to be a certified copy from the records of Marion county, of a power of attorney from Wm. Muldrow together with the indorsements and certificates thereon which being objected to as secondary evidence, the court sustained the objection and excluded it, unless the absence of the original was accounted for, and unless there was evidence to show possession in the grantee, Gray, for more than ten years before this suit was brought, and proof was made that Wm. Muldrow, on the 23d of Feb., 1849, (the date of power of attorney) owned lands in the county of Marion, on which the instrument could operate.

Thereupon, the defendant read the deposition of M. L. Gray, his grantor, who stated that he had at all times since June, 1850, until his conveyance to defendant, claimed the land in dispute, under said instrument and the deed of Wm. Muldrow by John Muldrow, his attorney in fact; that he had caused the premises to be assessed to him and through his agents had paid the taxes from 1854 to 1871; that he had employed one Knox to keep off trespassers up to 1866, and afterwards Mr. Hale.

Defendant also produced and read in evidence the tax receipts, admitted to be genuine, signed by the collector of Shelby county, showing the payment of taxes by Mr. Gray, as stated.

The agent, Hale, was then introduced as a witness, who stated that he had searched for the original power of attorney; that he ascertained that John Muldrow had been dead

many years, and one George Muldrow was his administrator; that he applied to said Geo. Muldrow, and at his request Geo. Muldrow and witness searched among the papers of the estate for said power of attorney, but it could not be found; that the witness then applied to the recorder of deeds of Marion county, and also of Ralls county, and their offices were searched by said recorders and by witnesses, without success, and witness had applied to various other persons, but failed to find this paper.

The defendant then introduced the plaintiff as a witness, who stated that he was the son of Wm. Muldrow; that in February, 1849, his father lived in Philadelphia, a town or village in Marion county, in a brick house; had been in possession of the house and lot several years, also cultivated lands in the vicinity which he claimed to own, and also claimed title to some timbered land in the neighborhood, from which he got his firewood, and claimed several other tracts of land in Marion county.

This witness further stated, that, in March or April 1872, he was at the defendant's house, whose farm adjoins the premises in dispute; that on that occasion defendant told the witness that the tract in dispute belonged to Mr. Gray of St. Louis; that his father conveyed the said tract to himself in Oct. of that year in satisfaction of a debt due witness for money loaned. Witness further stated, that at the time the deed was made to him he did not know that the tract described in it was the same land that the defendant had told him belonged to Mr. Gray; he discovered this afterwards. Witness further stated, that when he bought the land from his father, he had not examined the title of the land, and did not know that Mr. Gray or any one else claimed it. All this testimony was objected to, and exceptions duly taken to its admission.

The court then admitted the copy of the power of attorney and the certificate thereon to be read in evidence. The power of attorney is in the usual form, authorizing John Muldrow, as his—William's—attorney in fact, to grant, bargain and sell any of his lands in the State of Missouri. The

Muldrow v. Robison.

acknowledgment and certificate are also in the usual form, made by the clerk of the Circuit Court of Marion county, and dated 23d Feb., 1849.

This was all the evidence in the case, and thereupon the plaintiff asked the following instructions: 1. Unless the power of attorney from Wm. Muldrow to John Muldrow, by virtue of which Jno. Muldrow executed the deed to Melvin L. Gray, was recorded in Shelby county, a deed made pursuant to said power of attorney cannot avail against the plaintiff, unless plaintiff, at the time of his purchase, had actual notice of the existence of such power of attorney. 2. The patent and deed of Wm. Muldrow to plaintiff, vested title in plaintiff, and the deeds read in evidence by defendant are not sufficient in law to show title in defendant to the premises in dispute. 3. The facts of the payment of taxes on the land, and that defendant went on the land and cut out a fence row on the south side of the land, and put up a fence, under his deed from Gray, cannot amount to notice to plaintiff, unless a knowledge of such facts came to plaintiff prior to the execution of the deed to him from Wm. Muldrow. 4. The certified copy from the records of Marion county of the power of attorney from Wm. Muldrow to John Muldrow, purporting to be from the recorder's office in Marion county, Missouri, is no evidence of the previous existence of an executed original. 5. The facts stated by the witness (plaintiff) introduced by defendant, do not constitute such notice to plaintiff of the execution by Wm. Muldrow to John Muldrow of the alleged power of attorney, an alleged copy of which has been read in evidence, nor of the execution by Wm. Muldrow of the deed to Gray, as to prevent the plaintiff's recovery in this action. 6. The instrument read in evidence by the defendant, purporting to be a copy from the record in Marion county of an instrument purporting to be a power of attorney executed by William Muldrow to John Muldrow, is not legal or competent testimony in this cause, and ought not to be considered in determining the question whether William Muldrow executed the deed read in evidence to M. L. Gray. 7. Although

the court, sitting as a jury, may believe from the evidence in this case, that plaintiff, prior to his purchase of the land in controversy from Wm. Muldrow, casually inquired of a person, whom he met, as to the ownership of a certain tract of land then in view, and was informed by said person that said tract of land belonged to Gray; and although the court may believe that the person to whom such inquiry was addressed was the defendant, Robison, and that the tract of land concerning which such inquiry was made and such information given, was the land in controversy in this suit; yet if the court should further believe from the evidence, that at the time of purchasing the land in controversy, plaintiff did not know and had no reason to believe that the land thus purchased, and in the deed to him described, was the tract of land formerly pointed out to him by defendant as belonging to Gray, and did not know that any person other than Wm. Muldrow claimed to own said land, then the facts above set out do not constitute actual notice, or any notice to plaintiff of the alleged power of attorney from Wm. Muldrow to John Muldrow, or of the alleged deed of Wm. Muldrow by John Muldrow to Gray.

The above instructions were all refused, but the court gave the following instructions for the plaintiff: "1. The patent from the U. S. to Wm. Muldrow and the deed to W. C. Muldrow, the plaintiff, are *prima facie*, in the absence of other testimony, sufficient to establish the plaintiff's right to the land in the petition described. 2. Although the court may be of opinion that the deeds read in evidence by defendant show in defendant a fee simple title to the premises in dispute, yet if it appears from the evidence that plaintiff, in October, 1872, purchased said premises from Wm. Muldrow for a valuable consideration, and recorded his deed therefor, defendant is estopped from setting up his title to said premises, as against plaintiff, unless it further appear that plaintiff, at the time of his purchase, had actual notice of the claim of defendant and his grantor to said premises.

4. "There is no evidence in the cause tending to prove that defendant or those under whom he claims had any actual possession of the premises in dispute prior to Aug., 1872, and the issue on the statute of limitations should be found for plaintiff.

5. No conveyance of the land in controversy by Wm. Muldrow, prior to his conveyance of said land to Wm. C. Muldrow (plaintiff), is valid against the plaintiff, unless plaintiff had actual notice of such prior conveyance, or the same had been properly recorded."

The court gave for the defendant the following instruction: "The deeds read in evidence by the defendant, show the title to the premises in the defendant, and if it appears from the evidence that plaintiff at the time he purchased and accepted his deed, had actual notice of the claim of title by defendant or his grantor, M. L. Gray, to the premises, the plaintiff is not entitled to recover."

The court found the issue for defendant. The usual motions for a new trial were made and overruled, and the case was brought here by appeal.

It will appear from the above statement in which the instructions given and refused have been copied as explanatory of the points decided, and all the material testimony admitted has been also stated, almost in the language of the bill of exceptions, that the case mainly depended on the admissibility of the copy of the power of attorney, and on the question of actual or constructive notice.

The court below manifestly held; first, that the copy of the record in Marion county was admissible; second, that there was no constructive notice, and third, that there was actual notice. And the propriety of these conclusions we will proceed to consider.

The admissibility of the record copy of the power of attorney, from the records of the Marion Co. Recorder's office, is defended on two grounds, first, that the 30th section of our statute concerning conveyances, etc., authorized its admission, upon the proof therein required, and next, that it was admissible under the 40th section of our statute concerning evidence.

The 30th section of the act concerning conveyances (1 Wagn. Stat., 278) must be read in connection with the 29th, and both have reference to the five sections immediately preceding.

The 29th section provides, that "every instrument in writing, conveying or affecting real estate, which shall be acknowledged or proved and certified, as hereinbefore prescribed, may, together with the certificate of acknowledgment, or proof of relinquishment, be read in evidence without further proof."

The 30th section provides, that "where any such instrument is acknowledged or proved, certified and recorded, in the manner herein prescribed, and it shall be shown to the court, by the oath or affidavit of the party wishing to use the same, or of any one knowing the fact, that such instrument is lost, or not within the power of the party wishing to use the same, the record thereof, certified by the recorder under the seal of his office, may be read in evidence without further proof."

The 31st section provides that the evidence shall only be *prima facie* and the other party is allowed to rebut it.

It is clear that the 29th and 30th sections refer not only to deeds, but to any other instrument of writing affecting real estate, and that a power of attorney is regarded as such an instrument is manifest from the 27th and 28th sections which require such instruments to be recorded, and declare that their revocation must be established in the same manner. But these provisions all require powers of attorney to be proved, certified and recorded as other instruments of writing, conveying or affecting real estate, are required to be recorded.

The 24th section shows how this is to be done: it provides, that "every instrument in writing that conveys any real estate, or whereby any real estate may be affected in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county, in which such real estate is situated."

Conceding that the 29th and, consequently, the 30th sections embrace both deeds and powers of attorney, as we think they do, still the right to use the record in evidence under the circumstances named in the 30th section belongs only to cases where the deed or instrument has been recorded in pursuance of the previous provisions, and that is, in the county where the land supposed or sought to be affected by it is situated; and although the 30th section seems to have no bearing on the question of implied notice, and seems designed merely to authorize a specified kind of secondary evidence to be used in certain contingencies, and embraces as well such instruments as powers of attorney (provided they relate to land) as actual conveyances, yet the power of attorney from Wm. Muldrow to John Muldrow, being recorded in the county of Marion, and not in the county of Shelby where the land now in controversy was, is hardly within the purview of this action, as it was not recorded according to the anterior provisions of the act.

The 40th section of the act concerning evidence, like the 30th section in the law of conveyances, seems designed to provide a species of secondary evidence, and has no reference to the question of notice. Indeed it may be observed that those two statutes have mingled together in rather a confused way, various provisions adopted at intervals, some of which apply both to notice and secondary evidence, and others to the latter only. The 40th section evidently refers to the latter only, but is more general and comprehensive in its terms than the 30th section of the law concerning conveyances, and provides for the use of secondary evidence under other contingencies than those mentioned in the former. It provides that "whenever the records in the recorder's office of deeds of any county shall contain a record of any writing, instrument or deed, purporting to affect any real estate or any right or interest in or to the same, and such real estate, right or interest in or to the same shall have been claimed or enjoyed by any person, by or through such writing, instrument or deed, for a period of ten consecutive years, such writing, instrument or

deed and a certified copy thereof and of the time of its record, shall be *prima facie* evidence of the execution of such writing, instrument or deed, and of its genuineness and time of record, provided the said record shall have been made at least ten years next before such writing, instrument or deed, or certified copy thereof, is offered in evidence."

Now it is insisted that the words in this section, "writing, instrument or deed purporting to affect any real estate, or any right or interest in the same," do not include letters of attorney, or any instrument containing a mere power to convey or otherwise affect real estate, because the 24th section of the conveyance act uses terms equally broad and comprehensive with the terms used in the 40th section; and yet the 27th and 28th sections were deemed necessary to provide separately and expressly for letters of attorney. And this separation of the two classes of instruments, one conveying and the other giving a mere power to convey, has continued from the revision of 1825, down to the present time, as an examination of these various revisions will undoubtedly show.

But when we recur to the act of 1825, (Rev. Code of 1825, p. 222,) we find that after the particular enumeration of grants, bargains, sales, leases, releases, mortgages, defeasances, covenants, conveyances, bonds, etc., in section 14, and a definite provision for powers or letters of attorney in section 15, the 16th section, like the 29th, 30th, 31st and 32nd sections of the revision of 1865, embraces both conveyances and letters of attorney, since it is therein declared, that "every deed, conveyance or other writing of or concerning any lands, tenements or hereditaments, which by virtue of this act shall be required or entitled to be recorded as aforesaid, being acknowledged or proved, according to the provisions of this act, whether the same be recorded or not, may be read in evidence without any further proof of the execution thereof, and if it shall appear to the satisfaction of the court that the original deed so acknowledged is lost, etc.," then the record copy is allowed.

Muldrow v. Robison.

It is clear that this section included letters of attorney, giving authority to convey lands, since it applies to all instruments which by that act were authorized to be recorded, and letters of attorney were not only authorized, but required to be recorded; and this same provision contained in the 16th section of the acts of 1825, is virtually embodied in the 45th, 46th, 47th and 48th sections of the revision of 1855, (p. 365) and is in substance repeated in the 29th, 30th, 31st and 32nd sections of the present law. Not one of these provisions had any reference to notice, from the revision of 1825 down to the present. But it is plain that they embraced letters of attorney, as well as instruments conveying title.

When we come to the 58th section of the code of 1855, (p. 733) which is the first introduction of the provisions of section 40 in the revision of 1865 into the statute book, we find another provision in regard to secondary evidence, in a class of cases not provided for in the 30th section of the conveyancing act. It manifestly comprehends, as did the former, both letters of attorney giving authority to convey and conveyances themselves.

Considering this proposition clear, that the 40th section embraces both classes of writings referred to, the question still remains, whether each class of instruments must not have been recorded in the mode prescribed in the 30th section of the act concerning conveyances, in other words, whether it applies to instruments not recorded in the county where the land affected by it is situated.

So far as conveyances or powers of attorney to convey land in one county alone are concerned, there is no difficulty presented by this question, as it is manifest, that where a conveyance, or power of attorney to authorize it, is recorded only in a county where the land is not situated, it is not recorded according to law, and is mere waste paper. But in regard to a power of attorney, such as the present, which authorized the attorney to convey the grantor's lands lying in any county in the State, it might properly be recorded in any county where he had lands to be conveyed; and as the proof shows that

Wm. Muldrow had various tracts of land in Marion county, the power of attorney was properly recorded there.

The subject of notice is provided for in other sections of the act concerning conveyances.

In regard to deeds conveying land or letters of attorney accompanying them, the declaration of this section, that the record shall be *prima facie* proof of the original, and of its genuineness and of its time of record, was, most likely, merely for the purpose of showing that it had been recorded more than ten years before it was offered in evidence. The only object of the section was to provide a way of letting in secondary evidence of the deed.

When once admitted in evidence, the 25th section of the act concerning conveyances provides when it shall impart notice.

Whether this section 40 was designed to make this power of attorney, properly recorded as it was in Marion county, notice of a deed executed under it to a tract of land in Shelby county, is a question which may be promptly answered in the negative. Such a construction would conflict with the general intent of all our recording acts. But it still remains to be determined, whether this record of a power of attorney in Marion county, properly and legally placed on record there, may not be used under this provision in the statute concerning evidence, as secondary proof of the original, just as the original, if in existence, could have been used.

There is no doubt that the defendant could have used the original power of attorney, without which his recorded deed showed no title, but that power of attorney and deed would have been no more evidence against the plaintiff, than if the grantee had put both of them in his pocket on the day of their delivery, and kept them there for the twenty years intervening before the execution of the second deed to plaintiff, so far as implied notice is concerned.

But the deed and power of attorney would show title in the defendant's grantee at its date, and would be valid as between him and the grantor to him, and all others who might

purchase with actual notice. And secondary proof of this letter of attorney might have been made upon common law principles of evidence, without regard to any of the provisions of our statutes referred to; and it is strange that so plain and undisputed a mode of proof was not resorted to in this case, where the certificate of the clerk of Marion shows that he took the acknowledgment of this instrument, was acquainted with the parties to it, and of course could readily have sworn to its contents literally.

But this section 40 was doubtless supposed to be designed to supersede the necessity of resorting to sworn testimony of the contents of an instrument, where there had been a claim for ten consecutive years, and where the record was made more than ten years before it was offered in evidence. Like section 30 of the conveyancing act, which had the same purpose in case of a lost instrument, this section provided for secondary evidence of an instrument which may not be lost, but where the claim under it has lasted ten consecutive years and the record is also more than ten years old, at the date of the trial.

The common law rules of evidence have an elasticity which enables courts somewhat to adapt them to the peculiar circumstances of a case, but in regard to the positive provisions of a statute, the courts have no such power to go beyond the words, or the equity of the words, to apply them to cases unprovided for.

We are unable to see any distinction between the 40th section of the law of evidence and the 30th section of the law of conveyances, so far as the subject matter is concerned on which those sections are to operate. They both embrace deeds and letters of attorney, and all other writings affecting real estate. The same rule that applies to one applies to the other. The general tenor and purport of all our recording acts is to require a paper which affects lands to be recorded in the county where that land lies. If recorded elsewhere, it amounts to nothing so far as that land is concerned. We cannot make one rule for a deed and another for a power of

attorney, upon which that deed is based. The statutes nowhere make such discrimination, and the courts cannot legislate on the subject.

It is with reluctance we have reached this conclusion, because the case is a peculiar one, and we could see no good reason why the statute should not have provided for such a case. It is sufficient, however, for us to say, that the legislature, so far as we can see, have not done so.

The conclusion is, therefore, that the court erred in allowing the record of a power of attorney in Marion county to go in evidence to support a deed for land in Shelby county. In regard to the finding of the court on the question of actual notice, we see no reason for departing from that finding.

The question of actual notice is a question of fact, and as was decided by this court in *Beattie vs. Butler* (21 Mo., 328), is to be determined like any other fact. "Actual notice" observes Judge Scott, in that case, "does not require positive and certain knowledge, such as seeing the deed, but that is sufficient notice, if it be such as men usually act upon in the ordinary affairs of life." And Judge Leonard observed in *Vaughn vs. Tracy* (22 Mo., 418), "Now, as it is a rule not only of morals, but of public policy, that every one should use his own property and conduct his own affairs with proper prudence, so as not to hurt his neighbor, and that those who should fail to do so ought to answer for any damage they might occasion, the courts hold that the equitable ownership should prevail, not only against a purchaser with actual notice, but also against one who bought under such circumstances as would have afforded him notice, had he used proper care in making the purchase. And this distinction was thus made in English equity between actual and implied notice." And the conclusion of Judge Leonard was, that "the actual notice, the fact to be proved, is the matter prescribed by the statute; the competency of the evidence is another thing, to be settled by the courts, according to the ordinary rules of evidence, and the sufficiency of the evidence to establish the fact, is yet another question, which is submitted to the jury, and must be passed upon by them."

Muldrow v. Robison.

And in a late case, (*Speck vs. Riggin*, 40 Mo., 405.) Judge Wagner says, "notice may be either actual or constructive. It is actual when the purchaser either knows of the existence of the adverse claim or title, or is conscious of having the means of knowing, although he may not use them."

Now in this case the evidence shows that the plaintiff, when visiting the defendant, and pointing out the land he subsequently bought, and which he claims in this action, was told by the defendant that this identical land belonged to Mr. Gray of St. Louis. But the plaintiff explains this, and attempts to destroy this proof of actual notice, by saying that he did not know when he bought the land, that it was the same land pointed out to him as Gray's, and that he never examined the title papers or records.

Now, who is to take the risk of buying land, under such circumstances, the man who buys a tract of land, not knowing where it is, or to whom it belongs, whose deeds were duly recorded—though not so recorded as to impart constructive notice—or the subsequent purchaser?

It will be observed that the deed to this land from Wm. Muldrow to Gray was duly recorded in Shelby county, and the certificate of its acknowledgment also duly recorded, and that the certificate referred to a power of attorney, acknowledged before the clerk of Marion county, who made the certificate, and who declared that said power of attorney was duly executed and acknowledged before him and was recorded in his office.

The records of Shelby county are amply sufficient to put such purchaser on inquiry, and that he did not make any, was his own fault, and the record of the power of attorney in Marion county, though not admissible to prove the execution, as heretofore decided, was undoubtedly evidence on the question of notice, as well as the records of Shelby county. Though neither amounted to constructive notice, nor came within the provisions of our statute concerning secondary evidence, yet each was properly recorded, and legally recorded, in the two counties, and each was entitled to be read on the question of notice in fact.

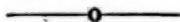
Wernecke, et al. v. Wood, Adm'r.

There was also evidence of possession taken by defendant some months before plaintiff bought, and the construction of fences around the tract, but this was also unknown to the plaintiff, as he states, and there was no proof to the contrary.

Upon the whole there is no ground for reversing the judgment, because of the finding of the court sitting as a jury on the question of actual notice.

That was a question of fact, on which the evidence tended very strongly to show that the plaintiff was in possession of such facts and circumstances as would have required a man of ordinary prudence to examine the records, and if he chose not to do so, it was his own fault, and his purchase was made at his own risk.

But as the power of attorney was essential to show title in the defendant, and there was no legal proof of it, the judgment must be reversed and the case remanded.



HENRY WERNECKE, *et al.*, Appellants, *vs.* IRA L. WOOD,
Adm'r of A. F. KENNON, dec'd, *et al.*, Respondents.

1. *Administrator, judgment against in Circuit Court—Motion to quash execution—Appeal from, etc.*—In this State a judgment against an administrator, rendered in the Circuit Court, will not authorize an execution in that tribunal, but must be executed by a proceeding in the Probate Court. But *semble*, that in case of appeal from judgment rendered on motion to quash such execution, and in the absence of any appeal or writ of error from the judgment in the cause, the Supreme Court will not interfere.
2. *Married women, judgment against.*—A judgment against a married woman is a nullity.

Appeal from Madison Circuit Court.

B. B. Cahoon with J. B. Duchouquette, for Appellants.

I. The objections to the judgment set forth in the motion to quash the execution, could have been corrected by appeal or writ of error, and the defendants having failed to avail themselves of this remedy, have none remaining. (Bracket

vs. Bracket, 53 Mo., 265; Marsh vs. Bast, 41 Mo., 493; Collins vs. Bannister, 48 Mo., 435; Finney vs. State, 9 Mo., 632.)

II. The administration of Kennon's estate was completed. The debt recovered against the plaintiffs, as Wood's sureties, was the only liability of the estate remaining unpaid. There was therefore no necessity to resort to the statutory administration law for the compensation to the securities for the debt of A. F. Kennon, which they had paid. It must be borne in mind that the action of the plaintiffs was a plain proceeding in equity. Suppose the remedy might have been completed under the administration law, that does not prevent a court of equity from exercising its functions. (Bevry vs. Robinson, 9 Mo., 276; Dobys vs. McGovern, 15 Mo., 622; Stewart vs. Calwell, 54 Mo., 539.)

III. Inasmuch as the Circuit Court of Madison county had jurisdiction, both of the persons of the defendants and of the subject matter of the proceeding upon the bill in equity, and the execution being regular upon its face, a motion to quash it does not lie. (McKnight vs. Spain, 13 Mo., 534.) And this is especially true when, as in this case, the defendants appeared to the action, and judgment was afterwards given against them on failure to answer. (Bracket vs. Bracket, 53 Mo., 265; Curd vs. Lackland, 49 Mo., 433.)

J. W. Emerson, for Respondents.

I. This judgment is simply absurd. It purports to be a general judgment against Ira L. Wood, and at the same time the decree shows that the estate of Kennon, not Wood, owes the debt. It is also a personal judgment against a married woman. It is a nullity. (St. Louis vs. Bernoudy, 43 Mo., 552; Bauer vs. Bauer, 40 Mo., 51; Higgins vs. Peltzer, 49 Mo., 152; 19 Mo., 441; 25 Mo., 408; 31 Mo., 419.)

The execution was rightly quashed. (36 Mo., 392), *ante*.

II. No execution can be issued in this State against the estate of a deceased person, and an attempt to sell lands in that way is void. (Swearingen vs. Adm'r, 7 Mo., 421; Carson vs. Walker, 16 Mo., 68; Miller vs. Doan, 19 Mo., 650;

Wernecke, et al. v. Wood, Adm'r.

Wagn. Stat., Title Executions, § 22; *Id.*, Title Judgments, §§ 15, 16, 17; *Id.*, Title Administrations, Art. III, §§ 11-17; *Id.*, Art. 4, §§ 1, 3, 4, 8, 27, 30.)

NAPRON, Judge, delivered the opinion of the court.

The questions presented by this record arose out of a motion to quash an execution, on a judgment or decree, in the same court in which the decree was rendered.

This decree was rendered on a failure to answer the petition, and as the decree finds all the facts to be true, as stated in the petition, it is useless to recite the petition. Both the petition and decree contain statements that have no bearing on the case; but the substance of the finding of the court, and of the judgment thereon, may be condensed into the following statement, which seems to be that upon which the counsel on both sides agree.

It is found by the court, that in Sept., 1861, A. F. Kennon died intestate; that letters of administration on his estate were first granted to his widow, Musidora A. E. Kennon, (now Mrs. Wood) and subsequently to her second husband, Wood; that Kennon owned certain lots in Fredericktown and other lots in Ironton; that plaintiffs were Wood's sureties on his bond as administrator. Kennon was indebted to the county of Madison on account of money borrowed from the school fund, and this indebtedness, not having been discharged by Kennon, was allowed in the Probate Court against his estate.

The administrator, Wood, defendant in this case, obtained an order from the Probate court to sell the real estate of Kennon at Fredericktown, in order to pay off this indebtedness to Madison county. At the sale his wife became the purchaser, and he so reported it to the court; but the purchase money was not paid by Wood, and the county of Madison, by certain proceedings stated in the decree, made it out of his sureties, the plaintiffs.

The sureties allege this sale to have been fraudulent and void, and the court so finds it, and decrees that it be set aside, and the judgment of the court is, "It is further considered,

ordered and adjudged and decreed, by the court, that these said plaintiffs (naming them) have and recover from said defendants, Ira L. Wood and Musidora A. E. Wood, the sum of seven hundred and eighty-nine dollars and fifty-nine cents, being the amount paid in manner and form as aforesaid by the plaintiffs, and interest on the part thereof paid to the county of Madison, at the rate of ten per cent. per annum, from the date of said judgment, which said sum of \$789.59, is to bear interest from date of this judgment until paid, together with the costs of this suit. It is further considered, ordered and adjudged and decreed, that plaintiffs, by reason of the premises, be subrogated and substituted to all the rights to which said county of Madison, for the use of the inhabitants of said township aforesaid, had or might have had in and to said property hereinbefore described, belonging to said estate of said A. F. Kennon, deceased, before the payment of said sum of money to said county as aforesaid by plaintiffs, in manner and form as found aforesaid by the court; that said sale and the deed of said property, hereinbefore described in the finding of the court, be and the same are hereby set aside, cancelled and forever held for naught, and that the whole of said property hereinbefore described, and all other property belonging to said estate of A. F. Kennon, deceased, not now disposed of, be charged with the payment of said sum of \$789.59, with the interest thereon, at the aforesaid rate of ten per cent. per annum, and that the said sum of \$789.59, debt and damages and the interest aforesaid found to be due the plaintiffs, together with their costs, be levied on the said real estate belonging to the estate of A. F. Kennon, deceased, and described as follows (here is a description of the lots in Farmington and Iron-ton); and it is further ordered and adjudged by the court, that of said premises above described, and the other property belonging to said estate of A. F. Kennon, not now disposed of, if any there is, be not sufficient to satisfy said debt, damages and costs, that the residue of said debt, damages and costs be levied of the goods, chattels, lands and tenements of said defendants."

Wernecke, et al. v. Wood, Adm'r.

The execution is as follows: "State of Missouri, to the sheriff of Iron county, greeting: Whereas, Henry Wernecke, etc., on the 8th day of October, 1872, at our Circuit Court within and for said county of Madison, recovered against Ira L. Wood, administrator *de bonis non* of the estate of A. F. Kennon, deceased, and Musidora A. E. Wood, wife of the said Ira L. Wood, and the estate of A. F. Kennon, late of Madison county, deceased, the sum of \$789.59, and also costs incurred in said cause, which have been taxed to the sum of — dollars and — cents, which said debt and costs were declared to be a lien and charged upon the following described property, situate in the city of Ironton, county of Iron, and State of Missouri, and described as follows, to-wit: (here the lots are named) which said sum together with the costs of said suit has been already reduced, since the rendition of said judgment, in the sum of \$365.00, leaving due on said execution the sum of \$521.39. Therefore, these are to command you that of the said described premises, and if the same be not sufficient, then of any other of the goods and chattels, lands and tenements of the said defendants, and of the estate of A. F. Kennon, deceased, you cause to be made the debt, to-wit: \$531.29 aforesaid, and that you have the same before the judge of our said court on the 4th Monday of September next, to satisfy said debt and costs, and have you then and there this writ, certifying how you have executed the same.

"Witness, Th. Holliday, clerk of our said Circuit Court, with the seal thereof, etc."

The plaintiffs, as the returns of the sheriff show, were the purchasers on the execution. The motion to quash is in the name of Ira L. Wood and his wife. This motion was sustained in the Circuit Court, and the appeal here is from the judgment on this motion to quash.

An execution must certainly have a valid judgment to support it, and if the judgment is of no validity, the execution will be equally void.

The judgment in this case it is not pretended was right. So far as it related to a cancellation of the deed and a substi-

tution of the plaintiffs to the claims of Madison county it was confessedly correct. But when the court undertook to give a personal judgment against Wood and his wife and also against the estate of Kennon it was manifestly improper.

We have no concern with anything except the judgment and execution, since there was no appeal or writ of error to the judgment. But if the judgment could not sustain the execution and was a nullity the execution could not avail.

The judgment was against a married woman, personally, and also against an estate of a deceased party. There could be no doubt of the power of the court to order the deed to be cancelled, and to direct that the land conveyed be considered as a part of the estate of Kennon; but then the claim would take the course prescribed by our statute in relation to claims against the estate of a decedent. But the judgment was not merely against the estate of the decedent, which could only warrant a proceeding in the Probate Court, but against the wife of his administrator.

To cite authorities to prove that in this State a judgment against the administrator of a decedent could only be executed by a proceeding in the Probate Court is unnecessary. It has so long been in our statutes that an examination of them is unnecessary.

No execution is allowed here against the estate of dead persons. Judgments against such have to be classified like other claims. But here is a judgment against Wood, administrator, personally, and against his wife, for a certain sum of money, and also a judgment that the money be made by a levy on the estate of Kennon, of which Wood was administrator, and against the estate of his wife.

The personal judgment against the wife for the money claimed was of course a nullity. She was not responsible as widow of her husband, who contracted the debt, or as his administratrix, or his heir, or as the wife of his administrator. The main object of the petition was to set aside and declare null, on account of fraud, a sale of lots in Fredericktown by the administrator and a purchase, or alleged purchase,

by his wife, and to subrogate the plaintiffs who were sureties on the bond of the administrator, to the rights of Madison county whose claim had been paid by these plaintiffs. This was done and properly done.

Beyond this nothing further was asked except under the general prayer for relief. Allowing that under this general prayer for relief a decree might go against the defendant, Wood, personally, it could certainly not go against his wife. But Wood was sued as administrator, and as such his sale and conveyance to his wife was declared null, and then a personal judgment was entered against him and his wife, and along with this a judgment against the estate of Kennon, and the execution, following the judgment, was against Kennon's estate, against Wood, and against Mrs. Wood, and her interest in dower in Kennon's estate.

The judgment, so far as it affected Kennon's estate, would not authorize any execution but would have to be proceeded on in the Probate Court, as other judgments. So far as it affected Mrs. Wood, formerly Mrs. Kennon, it was a nullity, as no personal judgment could be had against a married woman; so far as it was a personal judgment against Wood, it might have been executed, but the execution was against property of Kennon's estate and against property of Mrs. Wood, as well as Wood, and was in fact levied, as the return shows, on property of Kennon's estate.

The main ground on which this execution is sought to be supported is, that there was no appeal from the judgment, and no writ of error sued out, and therefore, in this proceeding it must be assumed as right; and the case of *Brackett vs. Brackett*, (53 Mo., 265,) is relied on to support this proposition. In that case it was held that where a court has power to render a judgment, any mere irregularity in the proceedings, which may be overruled by appeal or writ of error, or other proceeding to correct the judgment, will not avail in a motion to quash the execution. And this proposition is correct, and its application in the case referred to was obviously right.

State v. Lises.

But in this case the execution was against a married woman and against a decedent's estate, and against the interest of said married woman in that estate, and against Wood, former administrator of the decedent.

Conceding that no inquiry on such a motion would be allowed in regard to the judgment against Wood, personally, nor in regard to the judgment against the estate of Kennon, yet the judgment against the wife of Wood was clearly a nullity, and no execution could be had against the estate of Kennon. But the execution in this case is against both Mrs. Wood and against Kennon's estate, and the return shows that it was levied on the latter, and on Mrs. Wood's dower interest in it.

We think the court below properly quashed the execution, because no writ could go against the estate of a decedent. (Wagn. Stat., Title Execution, § 22; *Id.*, Title Judgments, §§ 15, 16, 17; *Id.*, Title Administrator, §§ 11-17.)

Judgment affirmed; the other judges concur.



STATE OF MISSOURI, Appellant, *vs.* JOHN E. LISLES, Respondent.

1. *Indictments—Selling "intoxicating liquors" on Sunday—Dram-shop keeper.* Under the statute (Wagn. Stat., p. 553, § 22) an indictment charging that defendant sold "intoxicating liquors" on Sunday, but failing to aver that he was a dram-shop keeper, "is bad.

Appeal from Stoddard Circuit Court.

Geo. Houck, for Appellant.

Linus Sanford, for Respondent.

SHERWOOD, Judge, delivered the opinion of the court.

An indictment in this form: "The grand jurors of the State of Missouri, for the body of Stoddard county, upon their oath present, that one John E. Lises, on the first day of June, 1873, at the county of Stoddard, aforesaid, unlawfully

then and there did sell to a person to these jurors unknown, intoxicating liquor, to-wit: one pint of whisky for five cents; one pint of brandy for five cents; one pint of wine for five cents; one pint of beer for five cents; one pint of lager beer for five cents; one pint of ale for five cents; one pint of gin for five cents, on the first day of the week, commonly called Sunday, against the peace and dignity of the State" was held insufficient on a demurrer assigning in substance as grounds:

1. That the indictment did not charge defendant with any offense under the laws of this State; 2. That the language of the statute creating the offense was not pursued in the indictment; 3. That the indictment attempts to charge that an offense was committed on the first day of the week, commonly called Sunday, when by the indictment it only is shown that the offense was committed on the 1st day of June, 1873.

There is nothing in the third ground of the demurrer, as it is sufficiently clear, that the selling took place on Sunday, the first day of June.

The other grounds assigned will be considered together; and in reference to those, it may be observed, that the expenditure of a very small amount of attention on the part of the prosecuting attorneys to the language of the statute under which indictments should be drawn would prevent quibbles from being raised, indictments from being quashed, costs from accruing; and greatly promote the prompt administration of justice. And it is truly astonishing what carelessness is frequently exhibited in the particular referred to.

Section 35, (p. 504, Wagn. Stat.,) under which the indictment seems intended to have been drawn, forbids the sale by any one on the first day of the week, etc., of "fermented or distilled liquor."

Under Wagn. Stat., (§ 22, p. 553,) a dram-shop keeper is forbidden to sell any "intoxicating liquors" on the first day of the week, etc. But it is not charged in the indictment that the defendant was the keeper of a dram-shop. The indictment is therefore bad, as it does not fulfill the requirements of either of the sections referred to.

Judgment affirmed; all the judges concur.

 Dailey v. Houston.

JAMES DAILEY and MARY DAILEY, his Wife, Respondents, *vs.*
 AARON B. HOUSTON and MARTHA J. HOUSTON, his Wife, Ap-
 pellants.

1. *Practice, civil—Suit by married woman—Allegation as to marriage of plain-
 tiff—Defect in—Amendment after verdict.*—In suit by the wife, although the
 allegations of her marriage at the time when the cause of action accrued may
 be technically insufficient, yet if the evidence shows the fact, and the defect
 did not mislead the jury, it may be cured by amendment after verdict.
2. *Practice, civil—Misjoinder of actions—Defect waived by failure to plead.*—A
 joinder in the same court of a claim for injuries done the wife, and a claim
 for consequent loss of services on the part of the wife to the husband, etc., is
 error; but the defect, if not taken advantage of by demurrer or answer, is
 deemed to be waived. (Wagn. Stat., 1015, § 10.)
3. *Husband and wife—Joint trespass by—Wife not liable.*—The general rule
 seems to be that no joint action will lie against the husband and wife for
 their joint trespass but the husband alone is liable. The wife is presumed
 to be under duress of the husband, and cannot be held, where such act is done
 in his presence or in connection with him. But where the petition charges
 that the trespass was committed by the wife alone, and contains no allegation
 that the husband committed the trespass, or that he was present, this doc-
 trine cannot be invoked.
4. *Damages for assault—Pecuniary condition of parties, etc., to be considered.*—
 In estimating damages caused by an assault and battery, the jury may take
 into consideration the pecuniary condition of the parties, their position in so-
 ciety, and all other circumstances tending to show the vindictiveness or atroc-
 ity, or want of atrocity, in the affair.
5. *Assault and battery—Action for—First assault—Nominal damages.*—In an
 action for assault and battery, where the answer simply denies the assault,
 plaintiff will be entitled at least to nominal damages, even though it appear
 from the evidence that plaintiff made the first assault.

Appeal from Putnam Circuit Court.

G. W. Easley, for Appellants.

I. If Houston directed the assault to be made, or was pres-
 ent and knew that it was being made, *prima facie* it was
 done under coercion of the husband, and the wife cannot be
 held liable. (Meegan vs. Gunsolis, 19 Mo., 419; McKeon vs.
 Johnson, 1 McCord, 578; 52 Mo., 39; 46 Mo., 114; 8 Am.
 R., 422-5.)

II. In a joint action of husband and wife, for assault and
 battery on the wife, compensation for the loss of service can-
 not be included in the damages. (Hill. Torts, [2 Ed.] p. 694,
 § 1; Barnes vs. Martin, 15 Wis., 240.)

G. D. Burgess, for Respondents.

I. The second instruction given by the court in behalf of plaintiffs, correctly lays down the law as to the measure of damages in cases of this kind. (*Buckley vs. Knapp*, 48 Mo., 162, 163; *McNamara vs. King*, 2 Gil., 432; *Clements, vs. Maloney*, 55 Mo., 352; *Bump vs. Betts*, 23 Wend., 85; *West vs. Forrest*, 22 Mo., 344.)

II. Defendants, Aaron B. Houston and his wife, were both proper parties to the suit. The husband is liable for the torts of his wife. (1 Chitt. Pl., 92, [14 Am. Ed.]; *Wagner vs. Bibb*, 19 Barb., 321; *Harbrook vs. Weaver*, 10 John., 247; *Whittelsey's Pr.*, 119, § 94; 2 Hill. Torts, 505, §§ 7, 8; *Smith vs. Taylor*, 11 Geo., 20; *Obermeyer vs. Greenleaf*, 42 Mo., 304.)

III. But if the court should be of opinion that the judgment should not have been rendered against the wife, they are asked to modify the same and order the proper judgment to be rendered in this court. (*Wagn. Stat.*, 1067, § 33; 1068, § 34; *State to use of Moore vs. Sandusky*, 46 Mo., 377; *Russell vs. DeFrance*, 39 Mo., 506; *Ferguson vs. Ferguson*, 36 Mo., 201; *Marr vs. McIntosh*, 21 Mo., 543; *Hunter vs. Miller*, 36 Mo., 143; *Orth vs. Dorschlein*, 32 Mo., 366.)

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover damages for an alleged assault and battery. The petition is as follows: "Plaintiffs state that the plaintiff, Mary Dailey, is the wife of the plaintiff, James Dailey, and that the defendant, Martha J. Houston, is the wife of the defendant, Aaron B. Houston; that on or about the 15th day of June A. D. 1872, the defendant, Martha J. Houston, at the county of Putnam aforesaid, with force and arms, did unlawfully assault and beat the plaintiff, Mary Dailey (then and still being the wife of the plaintiff, James Dailey) with a stone, and then and there willfully, unlawfully and violently beat, bruised and wounded her, the said Mary Dailey, so that her life was then and there greatly despaired of, and that by reason of such beating, bruising

Dailey v. Houston.

and wounding as aforesaid, she was for a long time, to-wit: eight weeks, in great pain and suffered so much pain from the beating, bruising and wounding aforesaid, that she was unable to attend to her ordinary domestic affairs of life which she otherwise would have done, and that they were put to great trouble and expense in consequence of said beating, bruising and wounding as aforesaid, and that they are damaged in consequence of the premises, in the sum of one thousand dollars, for which they ask judgment."

The answer of the defendants simply denies the assault and battery and the damages charged in the petition. A trial was had, a verdict and judgment rendered against the defendants for five hundred dollars. Motions for a new trial and in arrest of judgment were made and overruled, after which the defendants saved exceptions to the several rulings of the court, and appealed to this court.

The evidence introduced by the parties on the trial tended to prove the existence of the following facts: That on or about the 15th day of June, 1872, the plaintiff, Mary Dailey, and a neighboring lady were walking along a public road, accompanied by some small children; that as they were passing the house of the defendants, which was situate within forty or fifty feet of said road, Mrs. Martha J. Houston, the wife of defendant, Aaron B. Houston, and who was at the supper table on the porch at said house, remarked to her husband that she would go out to the road and see if Mrs. Dailey had told persons that she, Mrs. Houston, had been the mother of a negro baby before her marriage, and that if Mrs. Dailey had said so, that she would whip her; that the defendant, Aaron B. Houston thereupon told his said wife, that if Mrs. Dailey had been guilty of using such language "to whip her and he would foot the bill."

It is further shown by the evidence, that Mrs. Houston did go out to the road where Mrs. Dailey and the other lady were passing, where a fight ensued between Mrs. Houston and Mrs. Dailey. The evidence on the part of the plaintiff further tends to prove, that Mrs. Houston brought on the

fight, and struck Mrs. Dailey over one of her eyes with a stone, knocked her down and jumped upon and beat her with her hands, and pulled her hair, and that Mrs. Dailey was thereby injured and suffered great pain, from which she was rendered partly unable to attend to her domestic duties for several weeks; that plaintiff, James Dailey, was a farmer in very moderate circumstances, not able to hire help for his wife during her illness, and that defendant, A. B. Houston, was a farmer worth from six to eight thousand dollars.

The evidence on the part of the defendant tended to prove that no stone was used by Mrs. Houston in the fight, and that Mrs. Dailey had caught Mrs. Houston by the hair of her head before Mrs. Houston struck her; and also tended to contradict the evidence on the part of the plaintiff, in reference to the severity of the injury received by Mrs. Dailey. In the cross-examination of defendant's witnesses by the plaintiff it was shown that Aaron B. Houston was in plain view of the parties, at the time of the difficulty, about forty feet distant from the parties engaged; that he had directed and encouraged his wife to make the assault, and had approved of and commended the conduct of his wife immediately after the fight was over.

When the evidence was closed, the court at the request of the plaintiffs instructed the jury as follows:

1. "That no words, however insulting or aggravating they may be, justify or amount to an assault, and if they believe from the evidence, that the defendant, Mrs. Houston, assaulted and beat the plaintiff, Mrs. Dailey, and that the defendant, Aaron B. Houston, was present at the time and did not try to prevent the same, or if he ratified or approved the act after it was done, or in any manner, either by words or acts, encouraged or incited Mrs. Houston to assault the plaintiff, Mrs. Dailey, they are bound to find for plaintiff.

2. "If the jury find for the plaintiffs, they will assess their damages at such sum as they may believe from the evidence plaintiffs have sustained, not exceeding the sum of one thousand dollars. And in estimating the damages the jury may

take into consideration plaintiffs condition in life, their pursuits and nature of their business, the bodily pains and sufferings resulting from the injuries of Mrs. Dailey, the preceding condition in life of the defendants, the mental anguish and wounded feelings of the plaintiff, Mrs. Dailey, and may add thereto damages by way of exemplary damages, as punishment of defendants; provided they believe that such assault was wantonly or intentionally made.

4. "Although the jury may believe from the evidence in this case, that the plaintiff, Mary Dailey, did take the defendant, Martha J. Houston, by the hair, yet if they further find that the defendant, Martha Houston, committed any more violence towards the plaintiff, Mary Dailey, than was necessary to repel said assault, then they are bound to find for the plaintiff."

The defendants at the time objected to the foregoing instructions, and their objections being overruled, they excepted.

The court, at the instance of the defendant, together with other instructions given, instructed the jury, that "the burden of proof in this case is upon the plaintiffs, to show that the defendant, Mrs. Houston, first actually assaulted Mrs. Dailey, and did inflict upon her some injury, otherwise, the verdict should be for the defendants."

There are several grounds insisted on in this court for the reversal of the judgment rendered by the Circuit Court. It is first insisted, that the petition does not state facts sufficient to constitute a cause of action, for the reason that it fails to aver that the defendants were husband and wife, at the time of the committing of the grievances complained of; and second, that the petition sets forth a cause of action growing out of an injury to the wife, in which it is proper to join the husband and wife as plaintiffs, and then in the same count seeks to recover for the loss of the services of the wife, and for the trouble and expenses occasioned by the injury complained of, which, if recoverable on, is only recoverable by the husband alone.

As to the first of these objections, it may be that the petition is technically insufficient, but the evidence clearly shows that the defendants were married at the time of the assault complained of, and as it is not shown that the defendants were misled by the defective averment, the petition might, even after verdict, have been amended so as to conform to the evidence, and might be so amended in this court under the provisions of our statute of amendments.

As to the second point made, the petition is surely faulty, as containing two causes of action, one in favor of the husband alone, and the other in favor of husband and wife, in which the wife must be joined; but the statute provides that such defects, where they are not taken advantage of either by demurrer or answer, shall be deemed to have been waived. (Wagn. Stat., 1870, p. 1015, § 10.) The defendant in this case, having failed to demur, and having only answered by a general denial of the petition, cannot insist on the objection after verdict.

The next and most material point raised in this court, by the defendants, grows out of the first instruction given by the court at the instance of the plaintiff. By that instruction the jury are told, that if the defendant, Aaron B. Houston, was present at the time of the assault made by his wife, and in any manner encouraged or incited his wife to assault the plaintiff, Mrs. Dailey, they would be bound to find for the plaintiffs.

It is insisted by the defendants, that this instruction was improper; that if the husband was present at the time the assault was made by the wife, encouraging and inciting the wife to the act, the wife, under such circumstances, would be presumed to have done the act by the coercion of the husband, and he alone would be responsible for the assault made under such circumstances. At least it is insisted that the assault would *prima facie* be the assault of the husband, the presumption being that the wife acted by his coercion, and that it would devolve on the plaintiff to show that the wife, in such case, was the active and aggressive party, before she could be made liable for the assault.

Dailey v. Houston.

The general rule seems to be that no joint action will lie against husband and wife, for their joint trespass; but the husband alone is liable, and must be sued alone for such trespasses. In the case of *McKeon vs. Johnson*, (1 McCord, 578,) this doctrine is fully sustained, and although it is admitted by the learned judge delivering the opinion, that Mr. Chitty, in his work on Pleading, states the law to be different, yet it is asserted that the rule has been well established in this country, that no joint action will lie in such case.

In the case of *Meegan vs. Gunsolis*, decided by this court, Judge Gamble refers to the case of *McKeon vs. Johnson* with approval, and although the exact point did not arise in that case, the doctrine that a wife cannot commit a trespass in the presence of, or in connection with her husband, so as to make her liable to an action, was fully upheld and recognized. (*Meegan vs. Gunsolis*, 19 Mo., 417, and cases cited.)

It is contended by the plaintiff, that although the law may be, that the wife would not be liable in this case, still a judgment could properly be rendered against the husband, and that if the judgment is held to be improperly rendered in this case against both defendants, this court should not, for that reason, reverse the judgment and remand the case; but this court is asked to reverse the judgment and render a judgment here against the husband alone; and we are referred to the case of *Wagner and wife vs. Bill and wife*, (19 Barb., 321) in support of this view of the case. It is held in that case, that it is a question of fact, to be found like other facts by the jury, whether the wife, in that particular case, was coerced or not; that the presumption of coercion raised by the presence of the husband, when an assault was committed by the wife, might be rebutted by other facts in the case; the learned judge delivering the opinion in the case, further remarking, that "even assuming that the case was a case of coercion by the husband, it was no ground for nonsuiting the plaintiff. On the hypothesis mentioned, the husband was clearly liable. The action was joint and several in its nature, and it was entirely competent to convict the hus-

band and acquit the wife, if she was exempt from liability by reason of the coercion of her husband, or for any other cause."

Without questioning the decision of the court, in that case, if the action was correctly assumed to be joint and several, we doubt its applicability to the case under consideration. In the present case the action is brought against the husband and wife, for an assault and battery alleged to have been committed by the wife. There is no pretense in the petition that the husband was present, or that he was guilty of any assault or other trespass, he is only sought to be made liable for the assault committed by his wife, on the simple ground that he is her husband.

It seems to me that it would be inconsistent with every rule of pleading and practice, to render a judgment against the husband for his own trespass, when none has been charged against him. If this should be done, we would have the strange inconsistency on the record, of a petition in a cause charging one trespass, and a judgment rendered against one of the defendants for a trespass which had not been charged against him. The action in such a case is not for a joint trespass made by both defendants, and if we assume that the wife was coerced, we have seen that such an action would be improper.

It is next insisted that the court, by the second instruction given for the plaintiff, improperly told the jury, that in the estimation of the damages they might take into consideration the "condition in life of plaintiffs, and their pursuits and nature of their business." There is no doubt but that in estimating the damages in such cases, the jury may properly take into consideration the pecuniary condition of the parties, their position in society, and all other circumstances tending to show the vindictiveness or atrocity, or want of atrocity, in the transaction, and which tend to characterize the assault. (*McNamara vs. King*, 7 Ill., 432; *Clements vs. Maloney*, 55 Mo., 352.)

Opinion of Court in Response to Inquiries of Governor.

But in the present case the court had permitted the plaintiffs to prove that Mrs. Dailey was not able to do her usual work for several weeks after the assault, and that her husband, not having the means to hire domestic help, had to perform such duties himself, for at least a portion of the time. Under such circumstances, it is possible, at least, that the jury may have inferred from the language of the instruction, that the plaintiffs were entitled to remuneration for the loss of the services and labor of the wife. The language of the instruction in this particular was therefore improper.

It may not be improper to state in this connection, that the court improperly instructed the jury (on the part of the defendant) that unless they believed from the evidence that Mrs. Houston first actually assaulted Mrs. Dailey, and did inflict on her injury, they should find for defendants. The court in so instructing the jury, overlooked the fact that the defendants had only filed an answer denying the assault charged. No defense of *son assault demesne* was set up or relied on. Under such a state of pleadings the plaintiffs could recover at least nominal damages, even if the evidence should show that the plaintiff made the first assault.

The judgment will be reversed, and the cause remanded; the other judges concur.



IN THE MATTER OF INQUIRIES SUBMITTED BY HIS EXCELLENCY
GOVERNOR SILAS WOODSON.

1. *Supreme Court—Opinions in response to inquiries by governor—Not proper as to law already on the Statute Books.*—Under § 11, Art. VI, of the constitution, it is not proper for the Supreme Court to give an opinion in response to the governor, as to the constitutionality of acts which are already upon the statute books. It is the province of the Supreme Court to give an opinion or adjudicate upon such laws, only when the question of their validity is raised in some proceeding pending before them.

Opinion of Court in Response to Inquiries of Governor.

2. *Supreme Court—Opinion in response to Governor—Issue of commission not matter of control or interference by Supreme Court.*—In issuing a commission the governor acts in a political or executive capacity, and he alone can judge whether it should be exercised or not, and the courts can neither control nor interfere with him in the exercise of this right.

The following inquiries were submitted by the Governor to the Judges of the Supreme Court.

Under the provisions of the 11th section, of Art. VI of the Constitution, I beg leave to call your attention to certain constitutional provisions and legislative enactments, and most respectfully ask your opinions upon certain questions growing out of them.

The 14th section of Art. VI and the 52nd section of Art. VI of the Constitution, taken in connection with the act approved the 15th of March, 1872, entitled "an act dividing the State into judicial circuits, prescribing the times of holding courts therein and providing for the election of five additional Circuit Court judges and Circuit Attorneys," and the act approved the 31st of March, 1874, as found on page 41 of the acts of the last adjourned session of the General Assembly, embrace all the law, I believe, bearing upon the questions I wish to present.

Section 8 of the first cited act, as found on page 431, (vol. 1, Wagn. Stat.) declares that "the seventh judicial circuit shall consist of the county of Benton." The first section of the act approved March, 31, 1874, adds the county of Benton to the 25th judicial circuit, thereby changing the circuits at a session next preceding a general election; and the second section of the same act repeals the section of the act of 1872, making Benton county an independent circuit. The act of 1874 does not take effect till the first of January, 1875.

At the election held on the 3rd of November last, the people of Benton county, elected a judge for the seventh circuit under the act of 1872, holding the act of 1874, above referred to, unconstitutional and void, as it failed to authorize the people of Benton county to vote in the elec-

Opinion of Court in Response to Inquiries of Governor.

tion of circuit judge and changed the 25th circuit at a session held in the year next preceding a general election.

It will be seen upon an examination of the first section of the act of 1874, that the 25th circuit consists of the counties of St. Clair, Cedar, Dade, Barton, Vernon, and Benton. The judge elected at the general election, held on the 3rd of November last, by the qualified voters residing in the five counties first above named, has been commissioned.

The gentleman elected, as above stated, in Benton county, as judge of the seventh circuit, under the act of 1872, desires a commission for six years, to commence on the first of January, 1875, the very day upon which, under the act of 1874, Benton county becomes a part of the 25th Circuit. Hence I inquire :

First—Is the act above referred to, approved the 31st of March, 1874, constitutional ?

Second—From the facts, as I have stated them, is the gentleman, certified according to law to have been elected on the 3rd of November last, as judge of the seventh judicial circuit, entitled to a commission ?

WAGNER, Judge, delivered the opinion of the court in response.

The first question propounded is whether the act of March 31st, 1874, attaching Benton county to the 25th judicial circuit, is constitutional ; and the second question is, whether the person elected on the 3rd of November, as judge of the Circuit Court of Benton county, is entitled to be commissioned.

In reference to the first interrogatory it is only necessary to say, that the question relates to the constitutionality of an act which has already passed and is upon the statute book. It is the province of the supreme judges to only give an opinion or adjudicate upon such laws, when the question of their validity is raised in some proceeding pending before them. There would be a manifest impropriety in now undertaking, in this form, to pass upon the constitutionality of the act, as private rights have intervened, and these rights should be determined only when the parties interested are regularly before a tribunal where they can be heard.

 Washington Co. v. St. Louis & Iron Mountain R. R. Co.

Secondly, it is well settled that in issuing a commission the Governor acts in a political or executive capacity, and he alone can judge whether the power should be exercised or not, and the courts can neither control or interfere with him in the exercise of this right.

For these reasons we must respectfully decline giving any answers to the questions.

The other judges concur.

—o—

WASHINGTON COUNTY, Respondent, *vs.* ST. LOUIS & IRON MOUNTAIN RAILROAD CO., Appellant.

1. *Revenue—Board of equalization of railroad property.—Its duties defined.*
2. *Revenue—Board of equalization—Railroads—Assessment in counties—Pleading.—*Although it may appear from an allegation in the petition, that the board of equalization assessed the actual value of the railroad property in Washington county, instead of a share in the aggregate valuation proportional to the number of miles of road within the county, as required by law, yet if from the general tenor of the petition it appears that the sum assessed was ascertained by the methods which the law prescribes, the pleading will be held sufficient.
3. *Revenue—Board of equalization—Railroads—Assessment—Evidence—State auditor's certificate—Records of board.—*In a suit by the county to recover the amount of taxes assessed by the board of equalization against a railroad corporation, the State auditor's certificate to the County Court is not competent evidence to prove the action of the board. The record of its proceedings, which the board is required by law to keep, or its exemplification, is the best and only proper evidence for that purpose when attainable.
4. *Revenue—Board of equalization—Assessment without evidence.—*An assessment of valuations made by the board of equalization, without any evidence before it, would be invalid.
5. *Revenue—Auditor's certificate imperfect—Levy of tax—Action of board.—*While the auditor's certificate might be so imperfect as to justify the County Court in refusing to levy the tax, yet if it appears that the court, deeming the authority sufficient, has made the levy, this will not be disturbed if it also appear from other testimony that the action of the board was such as to authorize the levy.

Appeal from Washington Circuit Court.

Dryden & Dryden, for Appellant.

I. The petition, because it did not show what sum was apportioned by the board to the county for taxation, was bad. Without apportionment, no tax that could be levied could be legal. The county is authorized by the statute to levy taxes on the shares of the values apportioned to the county, but upon nothing else. The allegation then, that a sum was apportioned, was essential to the showing of the plaintiff's right to tax, and to sue and recover.

II. The auditor's certificate ought not to have been admitted. It was incompetent evidence for whatever purpose offered. 1st. If offered for the purpose of proving "the action" of the special board of equalization, it ought to have been rejected, because it was not the best evidence of the board's action, but it was no evidence of it. The statute creating this board, (Laws of 1871, p. 57, § 9) requires the board to keep a record * * * * and to file the same with the auditor (who is thus made the custodian and clerk of the board). The record thus kept, if any was kept, or a certified copy thereof, was certainly the best evidence of the action of the board, and in the absence of any statutory provision to the contrary was the only evidence. (Blackwell on T. T., 513-14; Dunn vs. Gaines & Gilbert, 1 McLean, 323; 14 Pet., 322.)

2. If the certificate was offered for the purpose of proving compliance by the auditor with the duty enjoined upon him, it was insufficient even for that purpose, because upon the face of it it appears not to be a compliance with the statutory requirement. The duty of the board was two-fold: First, under the 7th section of the act it is made its duty to adjust and equalize the aggregate valuation of all the property of the R. R. Co., as an entirety. This duty performed, the board must, secondly, under the 8th section of the act, apportion the valuation reached under the 7th section, to the several counties, cities and towns, according to rules laid down in that section.

The certificate read in evidence in this case is not a certificate in compliance with the statute—it does not certify to that which the law required the auditor to certify to, but plainly certifies to that with which the auditor has nothing to do. As the auditor certifies about a matter that he is not charged with by the law, and fails, wholly fails, to certify about a matter that he is charged with, his certificate is a mere nullity and proves nothing. It was plainly the duty of the auditor, the board clerk, under the 12th section, to give to the clerk of the County Court a certified copy of so much of the board's record as relates to apportionment under the 8th section. In no other way could he lawfully certify the action to the court.

Fletcher, Reynolds & Relfe, for Respondent.

I. The twelfth section of the act of March 10, 1871, directed and required the auditor to certify the action of said board to the clerk of the County Court, and section 13 makes that certificate the evidence upon which the County Court shall act. It is not only *prima facie* evidence of the amount of the value apportioned under section eight of the act to Washington county, but it is the only evidence that could be received, because it is made the evidence of that fact by the act itself, and the original certificate was produced and read at the trial. (*Glasgow vs. Rowse*, 43 Mo., 488.)

LEWIS, Judge, delivered the opinion of the court.

Suit was instituted to recover the county taxes assessed on defendant's railroad and other property, in Washington county, for five years, from 1868 to 1872, inclusive. Upon a trial before the court, without a jury, judgment was rendered in favor of the plaintiff for the sum claimed, \$16,038.81, with the statutory penalty of 2 1-2 per cent. per month, making a total of \$22,859.30.

It is objected by defendant, that the plaintiff's petition failed to exhibit a cause of action, and that, even if this should be found otherwise, the proofs were not competent to

authorize the recovery. The questions depend chiefly on the proper interpretation of "An act to provide for a uniform system of assessing and collecting taxes on railroads," approved March 10, 1871.

The fifth section of the act constitutes "a special board of equalization of railroad property," composed of the State auditor, State treasurer and register of lands, who "shall possess the same powers and discharge the same duties with reference to railroad property, as the State board of equalization with reference to all other property." The sixth section provides for time and place of meeting. Other sections are as follows: "Section 7. The board shall thereupon proceed to adjust and equalize the aggregate valuation of the property of each one of the railroad companies liable to taxation under the foregoing sections of this act. The board shall have power to summon witnesses by process issued to any officer authorized to serve subpoenas, and shall have the powers of a Circuit Court to compel the attendance of such witnesses, and compel them to testify. They shall have power to increase or reduce the aggregate valuation of the property of any railroad company, in accordance with the evidence produced before them and as they may deem just and right. If the said board should deem personal inspection of the property of any railroad company necessary to a thorough understanding of its value and a just decision, they shall have power to visit such road, and may adjourn from time to time for that purpose."

"Section 8. The board shall apportion the value of all lands, workshops, depots and other buildings belonging to each railroad company, to the counties, cities or incorporated towns in which such lands, workshops, or depots and other buildings are situate; and the aggregate value of all other property of each railroad company shall be apportioned to each county, city, or incorporated town in which such road may be located, according to the ratio which the number of miles of such road completed in such county shall bear to the whole length of such railroad."

It is apparent from an inspection of the seventh section that the first duty of the board is to consider in the aggregate, and as an entirety, all the property owned by each railroad company in the State. Its understood value is assumed to have been reported by the president of the company, under the second section. Is this reported estimate too high or too low? If either, it must be "adjusted," which, according to the received definition, means "fitted," "made accurate." The exact relation which the property bears to a money standard must be so fixed. Secondly, does one company upon a comparison of the extent and amount of its possessions with those of another, appear to have assumed a higher or a lower standard of values than that other? If so, they must be "equalized." These two processes comprehend the functions of the board under the seventh section. The power to "increase or reduce" is in like manner limited to the valuation of aggregates, and cannot be applied to divisible parts, whether by county boundaries or otherwise.

The aggregate valuation for each company's property being thus adjusted, and being also equalized upon a just ratio with all the others; the eighth section introduces a process of sub-division. Here is neither adjusting nor equalizing, but "apportionment" only. This, except as to lands, workshops, depots and other buildings, wholly ignores local values. It is based upon "the ratio which the number of miles of such road, completed in such county, shall bear to the whole length of such railroad." Thus, one county may contain railroad property worth far more than that within another, and may yet receive a smaller apportionment for taxation, by reason of having a less number of miles of road completed within its limits.

The petition, after various recitals touching the action of the board, proceeds to say: "That the total value of the property of the said defendant, the St. Louis and Iron Mountain Railroad company, in the county of Washington, so adjusted and apportioned as aforesaid by said board of equalization, subject to taxation for each of the years 1868, 1869, 1870, and

Washington Co. v. St. Louis & Iron Mountain R. R. Co.

1871, was \$281,630." The defendant holds this to be an allegation that the board fixed upon the sum specified as the actual value of the company's property within the county of Washington; and not as a share or an apportionment out of the valuation of the entire property. A critical interpretation of the language used might lead to such a conclusion. But other expressions in the same connection show substantially that a different meaning is intended. The general drift of the allegations is to the effect that the board, by the methods which the law prescribes, reached that sum as the share of Washington county in the aggregate valuation to be taxed.

Sections 9 and 12 of the statute are as follows; "Sec. 9. The board shall cause to be kept a fair record of all its proceedings and decisions; shall sign the same officially, and file said record in the office of the State auditor on its adjournment." "Sec. 12. The state auditor shall, in like manner, certify the action of said board had under the provisions of section 8 of this act, to the clerks of the County Courts of the proper counties, and to the secretaries of the several railroad companies, and thereupon the several County Courts shall levy for all county purposes, on such proportionate value as certified by the State auditor, such taxes as may be authorized by law at the same time and at the same rate as may be levied on other property."

Against the defendant's objections, plaintiff was permitted to introduce in evidence the auditor's certificate, as follows: "Auditor's Office, State of Missouri. To the Clerk of Washington county. It is hereby certified that the total value of the property of the St. Louis and Iron Mountain railroad in the county of Washington, subject to the taxation of the year 1872, as adjusted by the special board of equalization, provided by section 5 of "An act to provide for a uniform system of assessing and collecting taxes on railroads," approved March 10, 1871, is \$281,630, and that the same valuation was fixed by said board for each of the years 1868, 1869, 1870, and 1871. In testimony whereof," etc.

Treating this certificate as sufficient in form, we might find it competent testimony to show that such a certificate was transmitted by the auditor to the clerk, and that thus one of the requisites of the law was fulfilled. But nothing else was offered to prove what was done by the board of equalization, and this appears to have been considered sufficient. For such a purpose the certificate was a nullity. Because the law requires one officer to certify to another, certain facts for his information and guidance, it does not follow that the certificate so given will suffice to prove the same facts in all suits and issues that may arise upon them. It is required that every execution shall state the fact, with date and amount of the judgment rendered. But no one would pretend, that in a suit founded on the judgment, the execution recitals would be competent proof of its existence and incidents. An exemplification of the record would be demanded, and nothing else would suffice. In that case, as in this, the law makes the certificate sufficient evidence for the officer to whom it is directed, to justify him in assuming the facts stated and acting accordingly. There its functions cease, for nothing more was intended. But, aside from general principles, the very act before us, as if anticipating issues to arise between other parties, provides a better grade of testimony. By the 9th section the board is required to keep a "record of all its proceedings and decisions." For what possible end, if not to preserve authentic evidence of those proceedings and decisions? This record, or its exemplification, was the best evidence of what the board had done; and a rule which is too well known to be repeated here, would admit no other form of testimony while this was attainable.

The rule requiring the best attainable evidence of any fact to be adduced is said to be founded on a reasonable presumption that the failure to produce it evinces the party's knowledge that its introduction would defeat or weaken his claim. The facts in this case seem to advance that presumption with peculiar force. It appears from the auditor's certificate that "the same valuation was fixed by said board" for each of the

Washington Co. v. St. Louis & Iron Mountain R. R. Co.

five consecutive years. How did it achieve a procession of valuations so remarkably uniform? Considering it a matter of public and historical notoriety that the lengths, conditions and properties of all our railroads underwent very extensive changes during that five year period, a suspicion might be admissible that the board lightened its work by acting without testimony of any sort. If the records should confirm such a suspicion, it would simply invalidate the proceedings. The board was a body of special and limited authority, with duties clearly defined. By the seventh section of the act, it was invested with such ample powers to compel testimony for its safe and just guidance, that wholly to ignore them in the settlement of such important inquiries would be a gross violation of the spirit and manifest intent of the law. As well might a court of justice pronounce judgment depriving one of his property, or of his life, without a word of evidence in the case. But, however, this may have been, the *onus* was on the plaintiff to show that the board had performed its duties in the manner required by the law of its creation. Its records only could do this in an intelligible way.

The defendant objects that the certificate itself is not such as the law requires for any purpose; that it does not certify the "action of the board under the provisions of section 8;" that those provisions command not merely results, but methods of reaching them, and that the County Court was entitled and required to know that the board had substantially obeyed all the law contained in section eight, before levying the tax. It is insisted that no person, from a reading of this certificate, would ever discover that an apportionment had been made at all; and that it gives, instead of the "action of the board," only the auditor's conclusion therefrom; that moreover, his conclusion is a false one, if the board did its duty, since it furnishes not a sum representing an apportioned share in an aggregate valuation, but a sum which represents the actual value of the property found in Washington county.

Such objections might prevail in a different proceeding. If the County Court had refused to act upon this certificate,

and we were asked to compel it by *mandamus* to levy the tax, we might refuse a peremptory writ in the absence of a better showing that the auditor had done his duty. But the County Court having found the certificate sufficient for its information, we are unwilling to let the levy be disturbed in so far as it may be proved by competent evidence that the board acted in conformity with law.

The judgment will be reversed and the cause remanded for trial in conformity with this opinion; the other judges concur.

—o—

SARAH N. ROBINSON, *et al.*, Respondents, *vs.* JOSEPH H. WALTON, Appellant.

1. *Principal and agent—Representations of agent.*—The representations of an agent respecting the subject matter of his agency, if made at the same time with the transaction, as part of the *res gesta*, will bind the principal.
2. *Principal and agent—Question of agency for the jury.*—The question of agency is one for the determination of the jury.

Appeal from Washington Circuit Court.

G. I. Van Allen, for Appellant

Reynolds & Relfe, for Respondents.

NAPTON, Judge, delivered the opinion of the court.

This suit is upon a guarantee of this note "Potosi, Mo., December 2, 1868. On or before the 14th day of July, 1869, we promise to pay to the order of Sarah N. Robinson, the sum of \$1,464.44 negotiable and payable without defalcation or discount, and to bear interest at the rate of ten per cent. per annum from the 14th day of July, next, for value received. W. A. Mathews, D. E. Perryman." Across the back of the note, appears the following: "Sarah N. Robinson, P. M. Robinson, the undersigned, for value received, hereby guar-

antee the payment of the within note, on or before Jan'y 31, 1870. Joseph H. Walton, by Frank Harris. Frank Harris." And the real controversy in this case is whether Frank Harris was authorized to sign the guarantee above recited. To determine this, it will be necessary to state the history of the transaction and of the trial.

A deed of trust to secure this note of Mathews and Perryman, dated July, 1869, was given, and of its priority over executions levied subsequently there could be no question.

Walton and Frank Harris had bought this land under such executions, and their title was of course subject to the deed of trust to Robinson and wife, and they were anxious to get rid of this lien, and to do so, proposed to Robinson to buy this note.

The proposal of Walton was at first to pay for it with a draft at ten days, which he expected to procure from his brother, and Robinson was instructed to go to Irondale, (where he lived) and procure his wife's signature, which he did. But Walton did not succeed in getting the requisite funds or the proposed draft, and he and Harris therefore wanted further time, which Robinson finally agreed to. After several fruitless negotiations on this subject, it was finally agreed between all three, to close the trade in Potosi on a day named, at Harris' store where Harris and Walton were to meet Robinson. Walton failed to be at Potosi at the designated time, and Harris and Robinson met, and Harris signed Walton's name to the guarantee, which Walton says was without authority, but Harris says was not.

Upon this point of fact there was of course conflicting testimony given by Harris, Walton and Robinson, but as the jury passed upon this, under instructions, the only question for our consideration is the propriety of the court's instructions and the admissibility of certain statements of Harris to Robinson, made in the absence of Walton.

All the evidence in relation to Harris' claim of agency, testified to by Robinson, was excluded by the court, but Harris himself testified on this point.

The instructions given were as follows, in substance:

1. If Mathews and Perryman made the note in suit, and Walton and Harris for a valuable consideration guaranteed that said note would be paid before the 1st of January, 1870, the jury will find for plaintiffs the amount unpaid.
2. An extension of time on a note is a valuable consideration, and if one holds out another man to a third party as his agent, to do certain acts, or states that he has authorized him to do what he thought best in regard to a particular transaction, in his name, and that he would ratify and confirm his acts in the premises, this would constitute the intermediary an agent in the particular transaction, and the third party, who deals with such agent concerning said acts and transactions upon the faith of said declarations of the principal, would be entitled to hold the principal bound by the acts of said agent, done in the line of his said appointment.
3. If then, in this case, the jury find that Robinson extended the time of payment of the note in suit, on consideration that Harris and Walton would guarantee its payment, and that defendant, Walton, told the plaintiff, Robinson, that whatever Harris would do about the note for him (Walton) and Harris would be all right, and that said Harris, acting for himself and as agent for Walton to obtain an extension of the time of payment from said Robinson, guaranteed its payment before January 1st, 1870, and signed the name of Walton and of himself to said guarantee, Walton is bound by said act of Harris, and if the said note was not paid on or before January 1st, 1870, defendant, Walton, is liable for the amount unpaid.
4. If the jury believe that Walton left it to the discretion or judgment of said Harris to do for Walton and himself whatever he, Harris, thought it necessary to do for him (Walton) and Harris, to acquire the interest of Robinson and wife in the note and deed of trust, or to secure an extension of the time of payment of said note, and that in the exercise of that discretion or judgment, and for these considerations, Harris made the guarantee upon the note sued on in the name of himself and said Walton, then said Walton is bound by the act of Harris.
5. If the jury

find that Walton's name was signed by Harris, and that Walton had not authorized Harris to sign his name, yet if they further find that after Harris had signed his name, he told Walton of it, and Walton made no objection and afterwards approved of it, this ratification is equivalent to a prior authority.

These and other instructions were given, not exactly in the words stated, but substantially.

For the defendants, the court instructed that unless they found that Walton authorized Harris to sign his name to the guarantee, the defendant was entitled to a verdict, and as to the burden of proof that it was on plaintiff, and the court further instructed that a mere general power to Harris to settle this matter with Robinson did not authorize Harris to sign Walton's name to the guarantee.

The court refused an instruction asked by the defendant, to the effect, that if they found that the amount due on the note should only be paid on condition that the plaintiffs should transfer the note and deed of trust at the time the note was to be paid, January 1, 1870, even if the money was not paid, plaintiffs cannot recover, unless the jury find that plaintiffs before the commencement of this action, offered to transfer said note and deed of trust to defendants, and still hold themselves in readiness to do so, on payment of the note.

The court, however, gave the following instruction for defendant: "The jury are instructed to disregard all the evidence given by plaintiff, Robinson, in regard to any statements made to him by Frank Harris, that were not made in the presence of defendant, Walton, unless the jury find that Harris was the agent of Walton, authorized to sign his name to the guarantee. If the jury believe from the evidence, that defendant, Walton, authorized Frank Harris to arrange matters with Robinson, in regard to buying the deed of trust, etc., still that of itself would not authorize Frank Harris to sign Walton's name as a guarantor to said note."

The principal questions here are on the admissibility of evidence and on the instructions. Robinson was not allowed

to state the declarations of Harris, in the absence of Walton, yet, on the instruction given to the jury, these declarations were allowed, if the jury found that Harris was Walton's agent. The order in which testimony is introduced is somewhat a matter of discretion with the court trying the case. Where no *prima facie* case of agency or complicity is made out, the declarations of the agent or alleged conspirator are properly excluded. In this case, the declarations to Robinson made by Walton himself, would seem to have warranted the admission of Harris' subsequent declarations subject to the proof of agency.

Greenleaf says, "The principal constitutes the agent his representative, in the transaction of certain business ; whatever, therefore, the agent does in the lawful prosecution of that business, is the act of the principal whom he represents, and where the acts of the agent will bind his principal, there his representations, declarations and admissions respecting the subject matter, will also bind him, if made at the same time and constituting a part of the *res gestæ*."

This observation of Mr. Greenleaf is based on the supposition of an established agency, and needs no quotation of authorities to support it.

In the present case the agency is denied, and was really the point upon which the case turned. Harris, the alleged agent, testified most clearly to his agency in signing the guaranty. Walton, the principal, declared that the authority given to Harris was merely to stave off any definite action, until he could have an opportunity of examining the land. There seem to have been no willful misstatements on either side. But as Walton represented to Robinson, that Harris was authorized fully to represent him in the transaction, it was natural that the jury should incline to this view of the subject, and the question was one for the jury. Walton insisted, on his examination, that the authority he gave Harris was conditional on his examination of the land, which he proposed to make, and that all he said to Harris was to authorize him to make any arrangement which would postpone the sale, till

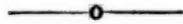
he could look into the matter. Harris denies this, and moreover, says that after the guaranty was signed by him he apprised Walton of it, and he further states, that he told Walton, when Walton said he could not attend at the proposed meeting of Robinson, Walton and Harris, at Potosi, that he did not very well see how they could expect to get time, except by their guaranty, till Jan. 1st, and Walton assented, and told Harris to do the best he could. In accordance with this authority, Harris signed Walton's name to the guarantee. His right to do so was found by the jury, and Walton's statements to Robinson seem to have authorized Robinson to rely on his representations that he had such authority.

There is really no conflict of statements between Walton and Harris on this point, which would require the issue to be decided one way or the other, on the mere question of veracity. Walton seems to have understood his authority to Harris as conditional upon his examination of the land. Harris did not so understand it, or so represent it to Robinson. He considered himself authorized to guarantee without regard to Walton's investigations, and so represented to Robinson. There is no doubt from Robinson's testimony, that Walton held out Harris as fully authorized to represent him in the matter. Under these circumstances it is not singular that the jury found for the plaintiffs, notwithstanding the instruction of the court which very much favored the defendants.

A *prima facie* case of agency was necessary to authorize the admission of Harris' declarations to Robinson. This was established by Robinson's statements, that Walton declared to him that Harris was fully authorized to arrange the matter. But Harris was a competent witness to prove his agency, and when his testimony and that of Walton was given, the question of agency was for the jury, and the court instructed the jury that unless they were satisfied that Walton authorized Harris to be his agent, all the declarations of Harris to Robinson should be disregarded.

These instructions could not well be complained of by the defendant. The instruction asked in regard to the title of land was properly refused, as there was no issue on this and the matter was entirely outside of the case.

The judgment must be affirmed; the other judges concur.



WILLIAM H. OWENS, Respondent, vs. HANNIBAL AND ST. JOSEPH RAILROAD COMPANY, Appellant.

1. *Railroads—Damages—Killing of stock—Negligence—Bells, etc.—Contributory negligence.*—Under the statute of this State, (Wagn. Stat., § 8) the failure, by the person in charge of a railroad train, to ring the engine bell or blow the whistle at a distance of at least 80 rods before reaching the crossing of a public highway, is negligence, and if, under such circumstances, cattle are killed at such crossing, such negligence is sufficient of itself to create a liability on the part of the railroad company, unless some contributory negligence can be shown on the part of the owner of the cattle.
2. *Railroads—Damages—Killing of stock—Bull suffered to run at large.*—Under the statute concerning animals running at large (Wagn. Stat., § 5) it is not unlawful for bulls to run at large until after notice has been given to the owner, and even then the only remedy would be the one prescribed by the statute; and under this view the fact that a bull was so permitted to run at large, would be no defense to an action by his owner for his killing by a railroad train. (Schwarz vs. Hann. & St. Joe. R. R. Co., ante, p. 207, affirmed.)
3. *Negligence—Question of law to be passed upon by court; of fact by the jury.*—Although in many cases where the facts from which negligence is to be inferred are undisputed, the question of negligence is one of law to be passed upon by the court, yet if the facts are disputed and the evidence conflicting, the question should always be left to the jury.
4. *Damages—Negligence—Burden of proof.*—In actions for damages arising from alleged negligence, the burthen of proof is always on the plaintiff.
5. *Damages—Railroads—Killing of stock—Efforts necessary to safety of passengers.*—Necessary efforts made by the agents of a railroad, after the discovery of cattle on the track, to save the train and passengers from threatened danger, would not render the railroad company liable even though they might result in injury to the cattle.
6. *Practice, civil—Trials—Instructions.*—When all the propositions of law contained in an instruction offered by one party, which are applicable to the facts, have already been declared in instructions given for the opposite party, the refusal of such first mentioned instruction is not error.

Owens v. Hann. & St. Jos. R. R. Co.

7. *Practice, civil—Trials—Verdict—Separate counts.*—When the petition sets up separate causes of action, stated in separate counts, with a separate demand for damages in each count, a general verdict for a general sum is improper, and is good cause for arrest of judgment. This rule does not apply where there is but one cause of action, stated in different forms, in different counts. In such a case a finding upon any one of the counts would be a bar to any further recovery on any count in the petition, and a general verdict for plaintiff would be sufficient.

Appeal from Hannibal Court of Common Pleas.

James Carr, for Appellant, cited *Briggs vs. Taylor*, 28 Verm., 180; *Louisville, &c., R. R. Co. vs. Ballard*, 2 Mete., [Ky.] 180; *Benno vs. Conn. River, &c., R. R. Co.*, 42 Verm., 375; *Pitts vs. Fugate*, 41 Mo., 405; *Clark's Adm'r vs. Hann. & St. Joe R. R. Co.*, 36 Mo., 215; *Wagn. Stat.*, § 5, ch. 6, p. 134; *Sedg. on Stat. and Con. Law*, 41, 87.

George Shields, for Respondent, cited *Calvert vs. Hann. & St. Joe R. R.*, 34 Mo., 242; *Garner vs. Hann. & St. Joe R. R.*, 34 Mo., 235; *Thompson vs. N. Mo. R. R.*, 51 Mo., 190; *Shearm. Neg.*, 46; 11 Wis., 160; 18 N. Y., 248; 37 Vt., 50; *Wagn. Stat.* 134, § 5; *Lloyd vs. Hann. & St. Joe. R. R.*, 53 Mo., 509; *Brady vs. Connelly*, 52 Mo., 19; *State, ex rel., Headlee vs. Henslee*, 54 Mo., 518; *Polston vs. See*, 54 Mo., 291-5.

VORIES, Judge, delivered the opinion of the court.

This action was brought to recover of the defendant, for damages occasioned to the plaintiff by killing of two head of cattle belonging to the plaintiff, by the negligence of the agents of the defendant in conducting a locomotive and train of cars on the defendant's railroad.

The petition consisted of two counts, the first of which charged that on a day named, defendant, by its agents, employees, cars and locomotives, carelessly and negligently ran over and killed of the property of plaintiff, one steer of the value of seventy-five dollars; that the defendant has not paid for the same, wherefore judgment is prayed, etc. The second count is exactly like the first, except the animal charged

to have been killed is described to be one bull, of the value of eighty dollars.

To each of these counts the defendant answered, denying the negligent killing of the animals therein respectively named.

The evidence on the part of the plaintiff tended to prove that the steer and the bull named in the different counts of the petition were run against and killed by the locomotive and cars of the defendant, at a point on the road where there is a public road-crossing; that the killing was done after dark in the evening, but that the night was light enough to see the cattle on the road for some considerable distance; that the head-light was burning brightly at the time, which would enable persons on the locomotive to have seen the cattle standing on the road for several hundred feet; that the train was running at a rapid speed, and that the speed was not reduced or abated as it approached the road-crossing where the cattle were standing; that no bell was rung, or whistle sounded on the locomotive or train of cars, until it approached to within less than fifty yards of the road-crossing, where the cattle were standing, and then, that the speed of the train was rather increased than diminished until it struck and killed the cattle.

The evidence further tended to prove, that the steer was worth from forty to seventy-five dollars, and that the bull was worth from fifty to eighty dollars.

The defendant, on cross-examination of one of the plaintiff's witnesses, offered to prove, by said witness, that from the condition and disposition of the cattle at the time of the killing, they would not have been apt to have run from the road from the mere noise occasioned by the ringing of a bell or the sounding or blowing of a steam whistle. This evidence was objected to and excluded by the court, and the defendant excepted.

On the part of the defendant the evidence tended to rebut any evidence of negligence, and to show that the night was dark and the cattle were not seen by the engineer until it was wholly impracticable to stop the speed of the train in

time to prevent a collision with the cattle; and that in such case it was the safest practice to increase rather than diminish the speed of the train, so as to throw the cattle entirely off the track, and thereby prevent the throwing of the train from the track, and thus lessen the danger to the passengers.

The evidence of the defendant also tended to prove that the whistle on the engine was sounded more than eighty rods from the road-crossing, and continued at intervals until the crossing was reached. There was evidence, also, to the effect that plaintiff's bull and steer were permitted to run at large outside of any inclosure for a great part of the time, and were so running at large at the time of the accident, although the bull had generally been kept up in a pasture, or attempted to be so kept up, but would break out of the pasture and was then suffered by the plaintiff to remain out running at large.

When the evidence was closed, the court, at the request of the plaintiff, instructed the jury as follows: "It was the duty of the servants and employees of defendant in charge of the locomotive and train, to cause the bell on the locomotive to be rung at a distance of at least eighty rods before reaching the crossing where the cattle were killed, and to keep said bell ringing until the train had reached the crossing, or to cause the steam whistle to be sounded at least eighty rods from said crossing, and cause it to be sounded at intervals until the locomotive reached said crossing; and if the jury are satisfied by the evidence that defendant's servants or employees in charge of said locomotive and train, did neglect to cause said bell to be rung, as above stated, and also further neglect to cause said whistle to be sounded, at least eighty rods before reaching said crossing, and did neglect to cause said whistle to be sounded at intervals until said train reached said crossing; such neglect to ring the bell, or sound the whistle, is, in contemplation of law, sufficient to charge defendant with any damage to plaintiff's stock resulting therefrom; and if the jury further find that the killing of plaintiff's stock was caused by such negligence, they should find the issue for plaintiff."

"2nd. The court instructs the jury, that if they believe from the evidence, that by the negligence or carelessness of the agents or employees of defendant in the operation of the locomotive engine and cars of the defendant the plaintiff's stock was run against and killed, then they will find for plaintiff."

"3rd. The court instructs the jury that if they find for plaintiff, then they will assess his damages at the reasonable market value of the stock killed at the time of such killing, with six per cent. interest thereon from said time of killing."

"4th. That it being admitted on the trial, that the stock of plaintiff, described in the petition, was struck and killed by defendant's locomotive and train at a point on defendant's road where the same is crossed by a public highway, it is incumbent on plaintiff to prove, to the satisfaction of the jury, that the servants or employees of defendant in charge of said train, were, at the time of said killing, negligent in the management of said train, and that said killing was caused by such negligence, and unless the jury find from the evidence, that the killing was caused by some negligence of defendant's servants or employees in charge of the locomotive and train, they should find the issue for defendant."

"5th. If the jury find, from the evidence, that the fact that the stock killed was on defendant's road at the crossing was not known to the engineer until the locomotive had reached a point so near the crossing, that to check the speed of the train, or endeavor to stop it, would have endangered the safety of the passengers, then the failure of the engineer to try to check the speed of said train, or his failure to try to stop the train, was not such negligence as to entitle plaintiff to recover in this action, nor would any acceleration of speed necessary to the safety of the train or passengers under the circumstances above stated, entitle plaintiff to recover."

The defendant objected to these instructions and excepted at the time.

The defendant then asked the court to instruct the jury as follows:

"1st. If the jury believe from the evidence, that the stock sued for was struck after dark; that the engine which struck said stock had a good head-light, and it was lighted and reflecting good light at the time said stock was struck; that the train which said engine was drawing was a passenger train running at the ordinary rate of speed as it approached the crossing of the public road on which said stock was struck; that said train was properly manned, and every man at his post, and the said engineer on the look out; that after the engineer in charge of said engine discovered that said stock was on the crossing of said road, it was impossible to stop said engine and train so as to prevent striking said stock; he had sounded the whistle on said engine, at at least eighty rods from said crossing and sounded it at intervals before arriving at said crossing; that it was safer to said train not to slow it before striking said stock, but on the contrary, it was safer to said train to run faster and knock said stock off the track, then defendant's agents and employees in charge of the said train were not guilty of negligence or carelessness in striking said stock, and they will find for the defendant. 2nd. If the jury believe from the evidence that the bull sued for was suffered by plaintiff to run at large, then they will find for the defendant."

These instructions asked for by the defendant were refused by the court and the defendant again excepted.

The jury then found for the plaintiff and assessed his damages at the sum of \$91.87 1-2, for which, judgment was rendered.

The defendant then filed its several motions for a new trial, and in arrest of judgment, setting forth as grounds therefor, the instructions of the court excepted to, as well as that the petition and each count thereof failed to state a cause of action against the defendant; and that the verdict was a general verdict on the whole petition when it should have found separate findings on each count in the petition.

These motions being overruled by the court, the defendant again excepted and appealed to this court.

It is first insisted by the defendant, that the court improperly excluded evidence sought to be elicited by the defendant in the cross-examination of the plaintiff's witnesses. It is sufficient to say that the evidence sought to be obtained by the questions asked, was in our view of the case wholly irrelevant and immaterial as applicable to any issue in the case, and was therefore properly excluded. It is next insisted, that the court erred in giving the jury the instructions asked for by the plaintiff; that said instructions presented an *ex parte* statement of the case, and wholly ignored the defense made by the defendant on the trial.

The first instruction given told the jury, that if the servants of the defendant in charge of the train and locomotive of defendant, neglected to cause a bell to be rung or whistle to be sounded at the distance of at least eighty rods from the road-crossing, as is required by the statute of this State, said neglect to comply with the law was sufficient in law to charge the defendant with any damage to plaintiff's stock resulting therefrom, and that if the jury found that the damage was caused by such negligence they should find for the plaintiff.

This instruction was a proper exposition of the law. The evidence was conflicting, as to whether the whistle was sounded, as the statute requires, or not, and it was proper to submit that question of fact to the jury; and if it was found by the jury that the bell had not been rung, nor the whistle sounded, as the law requires, that was sufficient of itself to create a liability on the part of the defendant, unless some contributory negligence was shown on the part of the plaintiff; and we think that there was no evidence in this case tending to show contributory negligence on the part of the plaintiff. (*Howenstein vs. P. R. R. Co.*, 55 Mo., 33.) It is insisted by the defendant, as to the bill sued for by the second count in the petition, that the evidence shows that he was suffered to run at large, in violation of the 5th section of the act concerning animals running at large. (*Wagn. Stat.*, 310, § 38.)

It was held at the present term of this court in the case of *Schwarz vs. Hann. & St. Jos. R. R. Co.*, that this statute did

not make it unlawful for bulls to run at large until notice was given the owner under the provisions of the statute, and that even then, the only thing that could be done, was for those who saw proper to do so, to use the remedy specifically pointed out by the statute. That view of the statute disposes of the second instruction asked for by the defendant, as well as one ground of its motion in arrest of the judgment.

It is next insisted, that the second instruction given by the court submitted a question of law to the jury. It is true, that in many cases where the facts, in a particular case from which negligence is to be inferred, are wholly undisputed, the question of negligence is one of law to be passed upon by the court; but where the facts are disputed, and the evidence conflicting, the question should always be left to the jury. (*Norton vs. Ittner*, 56 Mo., 351.)

In the present case, the facts relied on to constitute negligence were disputed, and the evidence to support and the evidence to disprove negligence, was conflicting, and the court properly submitted the question to the jury.

The fourth instruction properly told the jury that the burden of proving negligence was on the plaintiff; and the fifth instruction told the jury that any necessary effort made by the agents of the defendant, after the discovery of the cattle on the road, to save the train and passengers from threatened danger, would not render the defendant liable although it might result in injury to the cattle. Taking all of the instructions given by the court together, we think they fairly and clearly presented the law of the case to the jury, and that they were properly given.

The defendant further insists, that the court improperly refused the first instruction asked for by it. It is sufficient to say, in reference to this instruction, that each proposition of law, contained in the instruction, which had the least application to the facts proved, or attempted to be proved on the trial, was fully given to the jury in the instructions already given, and had been given in a manner more simple and easy to be understood by the jury. The court therefore properly overruled said instruction.

The objection taken in the defendant's motion in arrest of the judgment, that the petition in its different counts failed to state facts sufficient to constitute a cause of action, I think, is not well taken.

The petition is very concise, but still it seems to state, in each count, sufficient facts to constitute a cause of action at common law. In fact, the petition is almost exactly similar to other petitions held to be good by this court. (*Calvert vs. Hann. & St. Jos. R. R. Co.*, 34 Mo., 242.)

The only remaining question for our consideration is raised and insisted on by the defendant's motion in arrest of the judgment. It is therein insisted, that the court improperly rendered judgment on the verdict of the jury; that the jury made only a general finding in their verdict upon the whole petition containing two separate counts founded on separate and distinct causes of action, when there should have been a finding upon each count. This question has frequently been before this court, and it has been held by a series of cases running through the last fifteen or twenty years, that a general verdict for a general sum of damages, where there are several counts and causes of action set forth in the petition, is improper, and if an objection is made thereto, by motion in arrest of the judgment, the judgment should be arrested. (*Pitts vs. Fugate*, 41 Mo., 405; *Mooney vs. Kennett*, 19 Mo., 551; *Clark's adm'r vs. Hann. & St. Jos. R. R. Co.*, 36 Mo., 215; *Collins vs. Dulle*, 45 Mo., 269; *Bigelow vs. North Mo. R. R. Co.*, 48 Mo., 510.)

This rule does not, however, apply where there is really but one cause of action, stated in a different manner in different counts so as to meet any possible state of facts that may be shown by the evidence. In such case, a finding upon any one of the counts would be a bar to any further recovery on any count in the petition, and a general verdict for the plaintiff would be sufficient. (*Brownell vs. The Pacific R. R. Co.*, 47 Mo., 239.)

In the case under consideration, the causes of action stated in the different counts in the petition are stated as separate and distinct causes of action, growing out of two different

and distinct injuries to a different subject matter, and although we may believe from the evidence in the case, that both counts, or the cause of action stated in each, might properly have been included in one and the same count, yet they are not so stated and we must decide the case on the petition as it is, and not as it might have been drawn. The verdict was improper, and the defendant's motion in arrest should have been sustained.

The judgment will be reversed, and the case remanded; the other judges concur.



THE STATE OF MISSOURI, Respondent, *vs.* VIC. DEBAR, Appellant.

1. *St. Louis, city of—Bawdy houses—Amendment to charter—Repealing act, March 30, 1871, did not revive general statute.*—The amendment to the city charter of St. Louis, approved March 4, 1870, authorizing the corporation to "regulate or suppress" bawdy houses, operated a repeal within the city limits of the general law which prohibits the keeping of such houses. (*State vs. Clark*, 54 Mo., 33 affirmed.) The amendment of March 30, 1874, which repealed the former amendment, did not thereby revive the general statute in the city of St. Louis.
2. *Special act will prevail over inconsistent general law.*—If a special provision, applicable to a particular object or locality, be inconsistent with a general law, the former must prevail. And this rule applies to a comparison of duly authorized municipal ordinances with State statutes; since both are from a common source of authority.
3. *St. Louis, city of—Charter—Limitation that ordinances shall not be inconsistent with general law, yields to special provision.*—The charter limitation upon the power to pass ordinances, that they shall be "not inconsistent with any law of the State," being general, must yield to the special and particular provision which authorizes the regulation of bawdy houses, in contravention of the State law.
4. *Statute, construction of—Repeal by implication—Doctrine, applications of.*—While it is true that repeals by implication should not be favored, yet the proper application of this doctrine appears where the effort is to annul a special provision by implication of a general law.
5. *St. Louis, city of—Charter—Power to suppress bawdy houses.*—The city corporation of St. Louis has full power, under its amended charter, to suppress bawdy houses.

*Appeal from St. Louis Court of Criminal Correction.**Joseph G. Lodge with N. C. Claiborne, for Appellant.*

I. When a law repealing a former clause or provision shall be itself repealed, it shall not be construed to revive such former law, clause or provision, unless it be so expressly provided. (Wagn. Stat., 894, § 3.)

II. The charter of the city of St. Louis of 1870 was a law repealing a general law of the State (concerning bawdy houses, and under which defendant was prosecuted below) within the city of St. Louis. (State vs. Clark, 54 Mo., 33.) And said charter of 1870 was itself repealed in 1874, without, however, expressly reviving the general law formerly repealed, within said city.

M. W. Hogan, for Respondent.

I. The general statute was not repealed; it was only suspended in St. Louis during the existence of what was known as the Social Evil Ordinance, which tolerated bawdy houses within said city, under certain rules and regulations prescribed by the city council. And now that the power to regulate such houses has been taken away from the council, the suspension of the general statute in regard to them, within the corporate limits of St. Louis, is removed, and the keepers of bawdy houses, according to the provisions of said statute, can be punished here as well as in other parts of the State. (City of Hannibal vs. Guyott, 18 Mo., 520.)

LEWIS, Judge, delivered the opinion of the court.

The defendant was prosecuted by information and convicted under the general statute, which prohibits the keeping of bawdy houses. (Wagn. Stat., 502, § 19.) Her appeal to this court is based upon an assumption that the statute is not operative within the limits of the city of St. Louis.

The act amending the city charter, approved March 4, 1870, authorized the passage of ordinances, not inconsistent with any law of the State, for a great variety of purposes, and

among them "to regulate or suppress bawdy or disorderly houses, houses of ill-fame or of assignation." The amendment enacted March 30, 1874, repealed the terms of this special authority, substituting the words, "to suppress (but not license) bawdy or disorderly houses, etc."

The question before us must be answered by an application to these charter amendments of the following statutory provision, (Wagn. Stat., 894, § 3): "When a law, repealing a former law, clause or provision, shall be itself repealed, it shall not be construed to revive such former law, clause or provision, unless it be otherwise expressly provided."

If, within the meaning of this provision, the charter amendment of March 4, 1870, operated a repeal of the general law, in its application to the city of St. Louis, then the repeal of that amendment by the enactment of March, 30, 1874, did not revive the general law, but left it still inoperative within the same city limits. And in that case, the defendant was wrongly convicted.

The decision rendered by this court, in *State vs. Clark*, (54 Mo., 17) is conclusive of the premised condition. As the judges then and now on the bench, were divided in opinion, it seems proper to say, that a majority of the court, as at present constituted, adheres to the conclusion then announced. The reasoning of the chief opinion is, in my view, unanswerable, if English words have determinate meanings. The legal issue in that case, turned upon the import of the word "regulate." If the legislative authority given to the city corporation to regulate bawdy houses, was inconsistent with a law which wholly prohibited their existence, then one law necessarily annulled the other, for both could not stand together.

I cannot conceive a harmony between one rule which says a thing may be done in a particular way, and another which says it shall not be done at all. The mind would revolt from a law "regulating" murder or theft. And this only because it would imply that the act might be committed, if done in conformity with the prescribed rules. The municipal ordi-

nances and the State statutes are from a common source of authority. One class presents it in a delegated, and the other in a direct form, but it is the power of the State which speaks in both. If that power says to the bawdy house keeper, "You must keep a sign over your door, otherwise you shall be punished;" and, in the same breath says, "Your house shall not exist at all, sign or no sign," there is a manifest incongruity somewhere. In order to enforce any "regulation," it is first necessary to ascertain that the subject of treatment is a bawdy house. And when that is done, a co-existent absolute prohibition renders the idea of regulating an absurdity. We are thus driven to choose, between irreconcilable utterances, which shall prevail.

When once the fact of conflict is assented to, the rule for settling the supremacy is simple enough. The general must yield to the particular provision. The statute law of prohibition is general; the charter authority is particular and special in its operation, and must therefore prevail over the former. But a supposed difficulty is suggested in the charter amendment itself, which permits only ordinances to be passed "not inconsistent with any law of the State." The rule just mentioned, easily disposes of this. The grant of power to pass ordinances, with its qualification, constitutes a general provision adapted to an infinite variety of objects of municipal legislation. The power to regulate bawdy houses is special and particular in its application to a single object. If there is inconsistency between the two grants, the latter must prevail.

The rule has had numerous illustrations in former decisions of this court. In *City of St. Louis vs. Alexander*, (23 Mo., 483) a special act, approved March 1, 1851, had authorized the city to subscribe for stock in the Ohio & Mississippi R. R. Co. A charter provision which had long been in force, and which was re-enacted March, 3, 1851—two days after the special act—was in these words: "The city shall not, at any time, become a subscriber for any stock in any corporation." Here was a palpable inconsistency. The Supreme

Court gave full effect to the special authority ; thus annulling as to its particular object, the general prohibition.

In the case of State *ex rel.* Vastine vs. McDonald, the general law required that public administrators should be appointed by the courts having probate jurisdiction in their counties, respectively. A special law provided for the election, by the people, of that officer in St. Louis county. The latter law was held to control the case. There seems a peculiar fitness in the application of that decision to the present case, raising from the fact that a revisory enactment operating upon both those laws, had provided, in effect, that "acts of a private, local or temporary nature," were continued in force, if not "repugnant to the provisions of the general statutes." This feature completes a parallel with the charter amendment before us, authorizing ordinances "not inconsistent with any law of the State." In either case, the special grant overrides the prohibitory reservation, as well as every other law expressed in general terms.

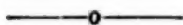
Reference is made to Baldwin vs. Green, (10 Mo., 410) and other cases, in which it is held that the grant of certain powers to a municipal corporation, does not necessarily hinder an exercise of the same powers by the State, through other agencies. They have no application to this case, in which the several powers under consideration are held to be different, and in their natures impossible to be exercised at the same time and on the same objects.

It is objected, that repeals by implication are not to be favored. But this doctrine has usually been applied where the effort was to repeal a special provision by implication of a general statute. The contrary application is attempted here, without the sanction of any fitting precedent, so far as I can learn. It follows that the decision in State vs. Clark, is here re-affirmed ; and, that, consequently, the general law upon which this information was based, is held to have been repealed within the city of St. Louis, by the charter amendment of March 4. 1870. It follows, further, that this repeal of the general prohibition remains in force—the operation

of the statute herein quoted preventing any revival by the alteration of the charter made on March 30, 1874.

The consequences, whatever they may prove, belong to the legislative, and not to the judicial authorities. There appears to be no question as to the power of the city legislature to suppress the evil complained of—so far as human laws may do so, within constitutional limitations—by virtue of the amendment last referred to.

The judgment below is reversed; Judges Napton and Wagner concur; Judges Vories and Sherwood dissent.



CHARLES BENT CARR, Respondent, *vs.* WILLIAM DINGS, Appellant.

1. *Wills—Construction—Life estate.*—A will which provided for the conveyance to the testator's widow, of such part of his estate as should remain after the payment of his debts, "to be used and appropriated by her in and about her maintenance and support, with power to her to dispose of one-fourth of the same remaining at the time of her death, as to her should seem fit, and that the residue of what should so remain, should, at the time of her death, pass to and be vested in the children of testator's deceased brother," conveyed to the widow only a life interest in the property, with a power to dispose of one-fourth of the property remaining after her support, at the time of her death. (Carr vs. Dings, 54 Mo., 95, cited and affirmed.)
2. *Wills—Construction of—Intention must govern—Term "residue."*—In construing wills the intention of the testator is the object to be attained, and, in order to ascertain this, it frequently becomes necessary to look at the whole will, and to qualify particular clauses, so as to make them harmonize with the general intention. And when a doubt arises as to the extent of the application of the word "residue," as used in a will, whether it was intended to apply to the whole of the residue of the estate, or be confined to a particular part, courts generally incline to extend it to the whole, where there is no other residuary claim.

Appeal from Jefferson Circuit Court.

S. Reber, for Appellant.

I. The will of John Kerr at the utmost, gives, and only proposes to give, three-fourths of his property remaining at

the death of his widow, to the children of his brother, G. W. Kerr.

(a.) The will gives one-fourth of the estate remaining at the death of the widow, to her. This is the effect of the devise to her of the entire estate for her support and maintenance, with power to dispose of one-fourth at her death as she shall deem fit. It will be observed, that the widow takes not simply a life estate, but the whole, if necessary to her support and maintenance, with the implied power to dispose of the whole for that purpose. The rule therefore applies, that where an estate is given to a person, not expressly for his life, with power to dispose of the same by will or otherwise, such person takes the fee. (*Rubey vs. Barnett*, 12 Mo., 3; 4 Kent, 536, 12 Ed.) But if the widow did not take a fourth of the property remaining, at her death, under the will, that fourth belongs to the heirs of John Kerr, *i. e.*, she is intestate as to that fourth, for:

(b.) By the terms of the will the widow is empowered to dispose of one-fourth of what shall remain at her death, and in the language of the will the "residue of what may so remain, shall at time of her death pass to and be vested in the children of my (his) deceased brother, Geo. W. Kerr." This clause so clearly only gives three-fourths of the property to G. W. Kerr's children, that no argument can make it plainer. The court, therefore, should have instructed, as prayed for by the defendant, that G. W. Kerr's children only take three-fourths of the property, under John Kerr's will.

II. The widow of the testator took the entire estate (after the debts were paid) by virtue of the gift for support and maintenance, with the implied power of disposing of the whole of it. This may be construed as a devise of the interest or estate to her.

John L. Thomas & Bro., for Respondent.

I. The court committed no error in construing the will as it did. This very construction was given to it by Judge Vories, when this case was here before. (*Carr vs. Dings*, 54

Mo., 95.) This settles the question which by law is not open to review upon a second appeal. (*Grunley vs. Webb*, 48 Mo., 609; *Chambers, Adm'r vs. Smith's Adm'r*, 30 Mo., 156.)

II. The intention of the testator is the polar star for the guidance of courts in the construction of wills. What, then, was the intention of the testator in this case? It may be assumed that the testator intended to dispose of his whole property in fee simple, and did not intend to leave any of his estate, or any interest in it, whether for life, for years, or in remainder, undisposed of. In the second place, we argue that Susan Kerr took only a life estate in all the property not required for the payment of debts, with power to dispose of one-fourth remaining at the time of her death. The language of the will, "also in trust after the payment of my debts, to convey whatever may remain of my estate to Susan Kerr, to be used and appropriated by her in and about her support and maintenance, with power to my said wife to dispose of one-fourth of the same remaining at the time of her death, as to her shall seem fit, and the residue of what may so remain, shall, at the time of her death, pass to and be vested in the children, etc." At common law this language would create only a life estate in Susan Kerr.

The want of the words, "heirs," or "heirs of her body," or words of similar import, is fatal to the construction that a fee was given, unless the 55th section of the Missouri Act in regard to Wills, has changed the common law construction to such an extent that the words used will create a fee. This section provides that the words, "heirs and assigns forever," shall not be necessary in devises of land to carry the fee, when no other expressions are contained in the will, whereby it shall appear that a life estate only, was intended to be conveyed, and no further devise of the premises be made to take effect after the death of the devisee. In the will under consideration, the words, "heirs and assigns," and "heirs and assigns forever," are omitted, and there are other expressions contained in the will, whereby it appears that a life estate only was intended to be conveyed, and there is a devise of

the premises over, to take effect after the death of Mrs. Kerr. The executor shall convey to her "whatever may remain of my estate, * * * to be used and appropriated by her in and about her maintenance and support."

If the testator had simply declared that the property should be conveyed to Susan Kerr, and there stopped, probably under the section referred to, she would have taken an estate in fee; but the estate is qualified by the words which follow: "to be used and appropriated in and about her maintenance and support." Whatever remained of the testator's estate was to be conveyed to, and thus used and appropriated by her. By these qualifying words it appears clearly, that the use of the property was given for life only. These words do not raise a power of disposition. (19 Mo., 415; 28 Geo., 265; Wright vs. Deme, 10 Wheat., 204; 11 East, 220.) But when we come to the latter clause of this devise, the intention of the testator becomes manifest. There is a devise over of the residue of what may remain at the death of the wife. The effect of a limitation over is thoroughly discussed by the Chief Justice, (Marshall) in the case of Smith vs. Bell, (6 Pet., 71; see also Rubey vs. Barnett, 12 Mo., 1).

III. From the language used in this will, viewed in the light of the authorities cited, it is manifest the testator intended to give his wife a life estate in his property only, with power of absolute disposal of one-fourth remaining at her death, as she might see fit, and upon her failure to dispose of the one-fourth the whole passed to and vested in the children of G. W. Kerr.

VORLES, Judge, delivered the opinion of the court.

This was an action of ejectment brought to recover the possession of a tract of land, in Jefferson county, in the petition described.

The petition was in the usual form. The defendant's answer was a denial of the facts stated in the petition, and also set up a special defense, which need not be noticed, as no evidence was offered in support thereof. A trial was had before the court, a jury having been waived by the parties.

It is conceded that the plaintiff, under the evidence, had a right to recover, provided that the last will of John Kerr could be properly construed so as to vest a title to the land in the children of George Washington Kerr at the death of Susan Kerr, the wife of the said John Kerr; the plaintiff claiming title under the children of George Washington Kerr. It is admitted that the title to the land was in John Kerr at the time of his death, and that the plaintiff has acquired all of the right and title which was vested in the children of George Washington Kerr, by virtue of the will of John Kerr and the death of his wife.

The will of John Kerr which was read in evidence reads as follows: "The last will and testament of John Kerr, of the city of St. Louis, Missouri, made this 1st day of December, in the year 1843. First. I revoke all former wills by me at any time heretofore made. Second. I hereby constitute and appoint Beverly Allen, of the city of St. Louis, aforesaid, executor of this, my last will and testament. Third. I devise and bequeath to my said executor, all my estate, real, personal and mixed, and whether held by me as joint tenant, tenant in common, or in severalty, in trust for the payment of my debts, which he will pay and discharge in the order prescribed by law for the payment of debts of deceased persons, hereby giving to my said executor power to lease or sell the same, without intervention of court, as to him shall seem best for my estate and creditors; also in trust, after the payment of my debts, to convey what may remain of my estate to my wife, Susan Kerr, to be used and appropriated by her in and about her maintenance and support, with power to my said wife to dispose of one-fourth of same remaining at time of her death, as to her shall seem fit, and the residue of what may so remain, shall, at time of her death, pass to and be vested in the children of my deceased brother, George Washington Kerr. In testimony, etc."

In view of the foregoing state of facts, the court was asked by the defendant to declare the law to be as follows: "1st. On the pleadings and evidence the plaintiff is not entitled to

recover in this action. 2. The will of John Kerr did not, and does not, operate to pass the title of said Kerr, or any interest he had in the land sued for, to the children of George Washington Kerr. 4. The will of John Kerr passed all the title he had in his property to his widow, Susan Kerr, absolutely, subject to the payment of his debts. 5. The plaintiff can in no event claim more than three-fourths of the property of John Kerr, which remained at the death of his widow, Susan Kerr, and the plaintiff, therefore, is not in any event entitled to recover more than three-fourths of the property sued for."

These declarations of law were all refused by the court, to which exceptions were taken. Judgment was then rendered in favor of the plaintiff, from which the defendant in due form appealed to this court.

The only matter presented for the consideration of this court is the proper construction to be given to the will of John Kerr, as set forth in the evidence. It is insisted by the defendant, that the effect of the will was to vest in the wife of the testator, after the payment of his debts, an absolute title to all of the property which should remain after the debts were paid, and secondly, it is insisted, that even if the will should be construed so as to vest in the widow of the testator only a life estate in the property left after the payment of the testator's debts, still, by the provisions of the will, the children of George Washington Kerr could only take three-fourths of the property remaining at the death of the wife of John Kerr.

As to the first position relied on by the defendant, it is only necessary to say, that when this case was in this court at a previous term, it was held that the wife of John Kerr, by the provisions of his will, only took a life interest in his property, with a power to dispose of one-fourth of the property remaining after her support, at the time of her death. (Carr vs. Dings, 54 Mo., 95.) After a further examination of the subject, we see no reason to doubt the opinion then expressed. (Rubey vs. Barnett, 12 Mo. 1; Gregory vs. Cowgill, 19 Mo., 415.)

The second position taken by the defendant, in the argument of this case, was not directly argued or brought in question on the former hearing of the case in this court. It is now insisted that the children of George Washington Kerr can only take three-fourths of the estate of John Kerr, under his will. The will devises the whole of the estate of the testator of every description to Beverly Allen, the executor, in trust, first, for the payment of the debts of the testator. After the debts are paid, the executor is directed by the will to convey whatever may remain of the estate to the wife of the testator, to be used and appropriated by her, in and about her maintenance and support, with power to the wife to "dispose of one-fourth of the same remaining at the time of her death, as to her shall seem fit, and the residue of what may so remain shall, at the time of her death, pass to and be vested in the children of my deceased brother, George Washington Kerr." It is insisted that the "residue of what so remains," as these words are used in the will, confines or limits the bequest to the children of George Washington Kerr to three-fourths of the estate, the same being what would remain after excluding the one-fourth which was subject to the disposition of the widow, and that, as the widow made no disposition of the fourth of the property remaining at her death, as to that part of the estate the testator died intestate, and it would descend to his heirs or next of kind under the law.

By a technical construction of the language used in the will, the bequest to the children might be so limited ; but in construing wills, the intention of the testator is the object to be attained, and in order to ascertain this object, it frequently becomes necessary to look at the whole will, by which it will sometimes become necessary to qualify particular clauses so as to bring them in harmony with the general intention, as the same may be indicated by other clauses. When a doubt arises as to the extent of the application of the word "residue," as used in a will, whether it was intended to apply to the residue of the whole estate, or to be confined to a partic-

ular part of the estate, courts generally incline to extend it to the whole estate, where there is no other residuary clause. (2 Redf. Wills, 448.)

In reference to the will under consideration, it appears to have been the intention of the testator to dispose of his whole estate, and to die intestate as to none of it. The testator clearly intended to provide for his wife, during her life, and at her death he gives her the power to dispose of one-fourth of what remains after her support, as she may deem fit, and as she has no power conferred on her to dispose of the fourth of the estate until her death, the disposition must be by will if any is made. After this power is given to the wife he gives the residue of what shall so remain at the death of his wife, to the children of his brother.

Now, the question is, did the testator intend by his will to give the residue of his estate, after carving out one-fourth thereof, to be disposed of by his wife, or did he intend to give his brother's children the residue of his whole estate remaining undisposed of for any of the purposes named in his will at the death of his wife? While we admit that the language used in the will is not entirely clear, yet we think that the testator intended to dispose of his whole estate, and that the intention was, that the children referred to in the will should take whatever remained undisposed of at the death of his wife.

With this view of the case, it follows that the judgment must be affirmed; the other judges concur.

PHILIP WARLICK, Respondent, vs. DANIEL PETERSON, Appellant.

1. *Evidence—Depositions—Certificate—Sufficiency of as to date of taking.*—The caption of depositions began as follows: "State of North Carolina, Burke county, March 12th, 1873. Pursuant to notice heretofore served, the following depositions of witnesses produced, sworn and examined on this 12th day of March, 1873," and concluded with these words, "Given at the Post Office in Morganton, in Burke county, North Carolina, on the 12th day of March, 1873." *Held*, that it sufficiently appeared thereby that the depositions were taken on the 12th day of March, 1873.
2. *Evidence—Depositions as to character—Admissibility—Impeachment of witnesses.*—In depositions offered to impeach the testimony of witnesses, the form of the question asked was, "Do you know A. B., if so, how long have you known him, and are you acquainted with his general character? If so, state what it is for truth and honesty?" The answers to the questions were full and explicit, and showed that the witnesses were testifying to the general character of A. B. at the place where he resided. The counsel of the opposing party was present and made no objection at the time to the questions or answers, but cross-examined the witnesses: *Held*, that the testimony was competent notwithstanding the informality of the questions; it would be too late to object at the trial on account of the form of the questions.
3. *Evidence—Settlement—Rebuttal—Letters.*—In suit on a promissory note, defendant alleged settlement by the assignment to plaintiff of certain demands and also pleaded the bar of the statute of limitations. Plaintiff, in reply, set up a new promise, taking the case out of the statute. On the trial, defendant was sworn as a witness on his own behalf, and on cross-examination proved certain letters, written more than ten years prior to the institution of the suit, but after the alleged settlement, as having been written by himself. These letters were afterwards introduced by the plaintiff, to contradict defendant's testimony as to a settlement. *Held*, that the letters would not be competent to take the case out of the statute, but would be admissible to disprove the alleged settlement. If the witness had not been a party to the suit, the letters might not have been admissible to impeach his testimony, but as he was the defendant, the letters were admissible as his admissions.
4. *Limitations—Acknowledgment of debt—What sufficient.*—In a suit on a promissory note, where the defendant relied upon the statute of limitations, a letter from defendant to plaintiff, which referred in clear terms to a note made by the debtor to the plaintiff, which remained unpaid, and promised to keep for the plaintiff all he could make over the amount necessary to support his family, was a sufficient acknowledgment to take the case out of the statute of limitations, if written within the time limited by the statute; provided it referred to the particular note in suit. Whether the promise referred to this note was a question of fact for the jury.
5. *Limitations—Acknowledgment—Sufficiency of, question for court.*—The sufficiency of an acknowledgment to remove the bar of the statute of limitations is a question to be passed upon by the court.

Appeal from Madison Circuit Court.

B. B. Cahoon, for Appellant.

I. The certificate of the justice appended to the depositions sought to be suppressed, wholly fails to comply with the requirements of the statute in this: it fails to show and omits to set forth that the depositions were reduced to writing, etc., on the day, between the hours, and at the place set forth in the notice. This omission is fatal. (Wagn. Stat., 526, § 22; Thomas vs. Wheeler, 47 Mo. 364-5; Moss vs. Booth, 34 Mo. 317.)

II. The character of a witness may be impeached by general evidence of reputation. (State vs. White, 35 Mo., 500.) And in doing this a party is not restricted to inquiries into his character for truth; the inquiry may extend to his moral character generally, for "a bad moral character generally, or a depravity not necessarily allied to a want of truth, may yet to some extent, shake the credibility of a witness, and therefore is a fair subject of investigation." (State vs. Shields, 13 Mo., 238; Day vs. State, *Id.*, 425.) The truth to be elicited must of course relate only to the general reputation of the witness. (1 Green. Ev., § 55; Wills on Cir. Ev., § 131.) And any form of question which will bring this general reputation out, may be said to be proper.

In substance the questions asked of the impeaching witnesses, are precisely the same questions approved by this court in former cases. (State vs. Shields, 13 Mo. 137, 8; Day vs. State, 13 Mo., 425.) And the same mode or form of question prevails in North Carolina, where the depositions were taken. (State v. Boswell, 2 Dev. Law R., 209, 210; Hume vs. Scott, 3 A. K. Marsh., 261, 2.)

III. The admission of the letters dated January 21st, 1860, and February 18th, 1860, after the appellant's case was closed was error. Because, 1st, they tended to confuse the issues and mislead the jury; and 2nd. because, being written far beyond the period of ten years next before the bringing of this suit, they were erroneously, at the close of the case, permitted to go to the jury to affect, in their minds, the ques-

tion of limitations, and they were not properly admissible for that purpose even if offered at the opening of the case.

But these two letters were ostensibly introduced to contradict the testimony of the appellant, and for such purpose erroneously admitted, because no foundation was laid by asking the witness if he had ever written any of the statements contained in the two letters, telling him what was therein contained, or previously permitting him to read the letters, neither of which was done. (*State vs. Starr*, 38 Mo., 279; *Lohart vs. Buchanan*, 50 Mo., 202; *Spaunhorst vs. Link*, 46 Mo., 197; *Angus vs. Smith*, 1 Mood & Malk., 474; 2 Phil. Ev., § 959, Am. Ed., 1859; 1 Greenl. Ev., § 462; 2 Brod. & Bing, 300-313; 1 Mood & Malk., 433.)

IV. It was error on the part of the court below to give, on the part of the respondent, instructions one and two. (a.) They both commented upon the evidence. (*Carroll vs. Paul*, 16 Mo., 226; *Fine vs. Public Schools*, 30 Mo., 166; *Anderson vs. Kincheloe*, 30 Mo., 520; *Fine vs. Public Schools*, 39 Mo., 59; *Rose vs. Spies*, 44 Mo., 20.) (b.) They both assumed that the letter of January 8th, 1867, contained an acknowledgment, not only of a subsisting debt, but by express terms of the note sued on, which was not the case, for the note was not named or identified in or by the letter; and those instructions further assumed that that letter contained a promise to pay the debt within ten years before the suit.

By such assumptions, the instructions took from the jury the consideration and determination of such facts, as these which they alone had a right to find. (*Turner vs. Toler*, 34 Mo., 361; *Thompson vs. Botts*, 8 Mo., 710; *Chouquette vs. Barada*, 28 Mo., 491; *Merrit vs. Given*, 34 Mo., 98; *Moffett vs. Conkling*, 35 Mo., 453; *Sawyer vs. Hann. & St. Joe. R. R. Co.*, 37 Mo., 240.)

(c.) They were, also, particularly the second which told the jury that the burden of proof to establish certain facts was upon the appellant, obnoxious, because they commented upon the weight and sufficiency of the evidence. (*LaBeaume vs. Dodier*, 1 Mo., 618; *Glasgow vs. Copeland*, 8 Mo., 268;

Schnerr vs. Lemp, 17 Mo., 142; Gilliam vs. Ball, 49 Mo., 249; State vs. Murphy, 52 Mo., 253.)

(d.) The suit was upon the note, and not upon the letter of January 8th, 1867, which did not give any valid cause of action. (Carr's Adm'r vs. Hurlbut's Adm'r, 41 Mo., 269; Leaper vs. Talton, 16 East., 423; Lea vs. Fouraker, 13 Barr, 1099; Sluby vs. Champlin, 4 Johns., 451; Shippy vs. Henderson, 14 Johns., 178; Baxter vs. Penniman, 8 Mass., 133; Low vs. Shaler, 3 Conn., 131.) And the letter was only evidence to be submitted to the jury for them to find if the promise or acknowledgment and its application to the debt evidenced by the note sued on was contained in the letter. (Bell vs. Morrison, 1 Pet., 362.) While it is true that if a deed, lease or similar document is introduced, its legal effect is a matter of law, and the court has a right to instruct the jury as to its proper construction and interpretation (Waddell vs. Williams, 50 Mo., 216; Willi vs. Dryden, 52 Mo., 322); this letter was not such a document thus to be construed, and it was the right of the jury, who are the exclusive judges of the weight and sufficiency of the evidence, to determine what it contained. (Harris vs. Woody, 9 Mo., 113; Callahan vs. Warne, 40 Mo., 131; McFarland vs. Bellows, 49 Mo., 311; Bowen vs. Lazalere, 44 Mo., 383; Deere vs. Plant, 42 Mo., 45; Claffin vs. Rosenberg, *Id.*, 439; Singleton vs. Pacific R. R. Co., 41 Mo., 465; Meyer vs. Pacific R. R. Co., 40 Mo., 451; McKown vs. Craig, 39 Mo., 156; Chambers vs. McGiverson, 33 Mo., 202.)

(e.) Moreover, that letter of January 8th, 1867 upon which the respondent relied, to take the note out of the bar of the statute of limitations, giving to it, for the respondent, the most liberal construction, was coupled and accompanied with conditions therein expressed, which repelled the presumption of an absolute promise to pay, unless the legislature increased the fees of the offices then held by appellant, and before the letter was for said purpose, in any event admissible, it was incumbent upon the respondent, to show that such conditions had been performed. (Bell vs.

Morrison, 1 Pet., 362; Carr's Adm'r vs. Hurlbut's Adm'r, 41 Mo., 268.)

V. The second instruction offered by the appellant and refused, told the jury that before rendering judgment on the note, they must find from the evidence that within ten years before the date of the institution of this suit, the defendant, in writing, expressly promised to pay the note, or acknowledged the same as an actual subsisting debt; that such an acknowledgment ought to contain an unqualified and direct admission of a previous subsisting debt, which the party is liable for and willing to pay, and that if such acknowledgment that said debt was subsisting is accompanied with conditions or circumstances which repel or rebut the presumption of a promise or intention to pay, or if the expressions used be vague, equivocal or ambiguous, leading to no definite or certain conclusion, the jury cannot render judgment against the defendant on the note on the ground of such acknowledgment that said note, at the time the letter was written, was a subsisting debt; that such promise to pay the note must be proved in a clear and efficient manner, and be in its terms clear, unequivocal and determinate, and if any conditions are annexed to such promise, it is incumbent upon the plaintiff to show that they have been performed. This instruction was in the language of, and properly presented, the law, as to the question of limitation, and it should have been given. (Bell vs. Morrison, 1 Pet. 362; Carr's Adm'r vs. Hurlbut's Adm'r, 41 Mo., 268; Elliott vs. Leake, 5 Mo., 208; Angell on Lim., pp. 214, 215, § 211; pp. 217, 218, § 212.)

Martin L. Clardy with F. M. Carter, for Respondent.

I. The acknowledgment of defendant in his letter of January 8th, 1867, to plaintiff, of a subsisting indebtedness, is clear and unequivocal. Upon such acknowledgment, the law implies a promise to pay. (Elliott vs. Leake, 5 Mo., 208; Chambers vs. Rubey, 47 Mo., 99.)

II. The suit was properly brought upon the original contract, and upon the new promise. (Carr vs. Hurlbut, 41 Mo., 264.)

Warlick v. Peterson.

VORIES, Judge, delivered the opinion of the court.

This action was brought on the 14th day of May, 1872, to recover the amount due on a promissory note executed by the defendant, payable to the plaintiff, for the sum of one hundred and twenty-two dollars and fifty-nine cents. The note was dated February the 19th, 1856, and made payable one day after date.

The answer of the defendant averred that no cause of action had accrued on the note within ten years, and relied on the statute of limitations. The defendant by his answer also set up as a further defense to the note, that in the year 1859 he and the plaintiff had a settlement of all demands and liabilities existing between them, and that upon said settlement he assigned and transferred to plaintiff certain claims and demands which he then had and held against one Duckworth and others, which were accepted by plaintiff in full satisfaction of all debts and liabilities of defendant to plaintiff, including the note sued on.

The plaintiff, by his replication to the answer, set up a promise in writing, by the defendant, to pay the note sued on, made on the 8th day of January, 1867, which it was claimed took the case out of the statute of limitations. The replication also averred that the defendant, shortly after the execution of the note, secretly, and with intent to defraud his creditors, absconded from the State of North Carolina, where the note was executed and where he then resided, and had remained absent from said State ever since; and then denied all other allegations in the answer.

The case was tried Sept. 28, 1873, by a jury. The verdict was for the plaintiff, for the sum of \$215.50, and judgment rendered thereon. Unsuccessful motions were made for a new trial and in arrest of judgment, and the case brought to this court by appeal.

There are several grounds relied on and urged in this court by the defendant for the reversal of the judgment. It is first insisted, that the Circuit Court erred in overruling the motion made by the defendant to suppress the depositions

filed by the plaintiff in the cause. The principal ground of objection to the depositions was, that they were not sufficiently certified by the officer taking the same. The defendant was notified by the plaintiff that depositions would be taken, etc., at the post office in the town of Morganton, in the county of Burke, and State of North Carolina, on Wednesday, the 12th day of March, 1873, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, etc. No objection is made to the form or service of the notice.

The caption to the depositions reads as follows: "State of North Carolina, Burke County, March 12th, 1873. Pursuant to notice heretofore served, the following depositions of witnesses produced, sworn and examined, on this 12th day of March, in the year of our Lord, one thousand eight hundred and seventy-three, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, at the post office, in the town of Morganton, county of Burke, and State of North Carolina, before me, William A. Ross, an acting justice of the peace," etc., and proceeding in the usual form.

At the conclusion of the depositions the justice certified that, in pursuance of the annexed commission and notice, came before him, at the post office at Morganton, in the county of Burke, State of North Carolina, between the hours of eight o'clock in the forenoon and six o'clock in the afternoon, (names of witnesses) of the same county, and State, "who were severally sworn to testify the whole truth of their knowledge touching the matter in controversy, between Philip Warlick, plaintiff, and Daniel Peterson, defendant; that they were examined and their examination reduced to writing, and subscribed by them, respectively, in my presence, at the time and place above mentioned, and that said depositions are now herewith returned. Given at the post office in Morganton, in the county of Burke, State of North Carolina, this 12th day of March, one thousand eight hundred and seventy-three."

It is objected that the certificate does not show that the depositions were taken on the 12th day of March, and is therefore bad. The caption to the depositions states, that the witnesses appeared on the 12th day of March, and were sworn and examined on said day, in pursuance of the notice. The certificate also states that the depositions were taken in pursuance of the notice attached, and in the conclusion of the certificate it is stated, "that the depositions are herewith returned, given at the post office in Morganton, in Burke county, North Carolina, on the 12th day of March, one thousand eight hundred and seventy-three." This we think, when all taken together, is a substantial compliance with the statute.

It is further objected, that there is no proper seal attached to the certificate of the officer who certifies to the official character of the justice before whom the depositions were taken. The officer certifies that the certificate is given under his hand, and the official seal of his office attached; and the clerk of the Circuit Court, in making out the transcript, copies the certificate and affixes a seal at the proper place, in the only way that it could be done, which is by placing a scrawl at the proper place, where the seal should be, placing within the scrawl the letters L. S., to indicate the place of the seal. This is the usual way of copying such certificates in bills of exceptions. It would be wholly impracticable to require the clerk to make an impression of the official seal of the officer on the record. We think the motion to suppress the depositions was properly overruled. (*Thomas vs. Wheeler*, 47 Mo., 363; *Moss vs. Both*, 34 Mo., 316; *Dale vs. Wright*, 57 Mo., 110.) There were other technical objections to the depositions, but the defects suggested are either not material or do not appear on the record.

It is next insisted, that the court erred in excluding the depositions of Thomas A. Dorsey, T. R. Caldwell and others, offered in evidence by the defendant. These depositions were offered to prove the general bad character of Alexander Duckworth and one Dailey, whose evidence had been intro-

duced by the plaintiff. The objections made to these depositions were general sweeping objections to the whole of the depositions, (four in number) on the ground that they were irrelevant and incompetent, and that the questions asked as to the character of the witnesses to be impeached, were irrelevant and incompetent, and laid no foundation for the impeachment of the witnesses.

The questions asked the witnesses were in substance, "Are you acquainted with Alexander Duckworth, if so, state how long you have known him; also, state if you are acquainted with his general character, and if you are acquainted with the same, state what it is for truth and honesty?" To this question the defendant answered, that he had been acquainted with Duckworth for sixty years, and was acquainted with his general character, and knew that his general character for truth and honesty was not good. Other similar questions were asked of other witnesses, in which they were asked if they knew the general character of said Duckworth, of Morganton, Burke County, North Carolina, etc. The answers to these questions were full and explicit, from which it appeared that they were testifying to the character of the witness in the community where he resided, in fact, the witness Caldwell expressly speaks of his character "in the community where he resided."

It is true that the questions did not in direct terms call for evidence of the character of the witness in the neighborhood or community where he resided, which is the usual and proper form in which such questions are asked; (1 Greenl. Ev., § 461) yet as the answers given to the questions plainly refer to the neighborhood where the witness resided, the evidence would be admissible, notwithstanding the informality of the question, and particularly where the attorney for the plaintiff was present, (as in this case) and cross-examined the witness, but made no objection to the questions and answers at the time. It would be too late to object on the trial. The objection in such case is more in the nature of an objection to the form than to the substance of the evidence. If the

objection was to the competency or relevancy of the question and the evidence elicited thereby, the objection of course might be made for the first time on the trial; but where the adverse party is present at the taking of the depositions, and makes no objection to either the question or the answer, at the time, and the answer to the question, though the question may not be in proper form, develops relevant and proper evidence, it would not be promotive of the ends of justice to reject the evidence on the trial of the cause. We therefore think that the objection to these depositions was improperly sustained, at least, as to the deposition of Tod R. Caldwell, although there is irrelevant matter in the deposition on other subjects, that ought to be rejected.

It is next insisted that the court erred in permitting the plaintiff to read in evidence two letters written by the defendant to plaintiff, one in February, 1860, and the other in January, 1860. These letters were introduced in evidence after the plaintiff had closed his evidence in chief; and after the defendant had introduced evidence tending to prove the facts in that part of his answer in which he set up and alleged a settlement between himself and the plaintiff, in which he had transferred claims to plaintiff, which were accepted in full satisfaction of the note sued on. During the examination of the defendant as a witness in his own behalf, the plaintiff exhibited these letters to him, and proved by him that the letters were written by him and were in his handwriting.

After the defendant concluded his evidence in defense, the plaintiff offered these letters in rebuttal of the defense and evidence introduced on the part of the defendant. The letters tended to show that the defendant had admitted his indebtedness to plaintiff on the note sued on, long after the time at which he alleged and attempted to prove that it had been settled and discharged. The letters were objected to by the defendant, because the promises to pay the note contained therein were conditional promises, and were made more than ten years before the commencement of the suit, and because they tended to contradict the evidence of defendant given on

the trial, and to impeach him as a witness, when no foundation for his impeachment had been laid, by calling his attention to the letters and the facts therein stated, so that he could explain the same, etc. A great many other objections were made, which need not be noticed.

If these letters had been offered to prove a promise to pay the debt sued on within ten years, in order to take the case out of the bar of the statute of limitations, they would certainly not have been admissible for that purpose, as they were written more than ten years before the bringing of the suit; but it does not appear that they were offered or relied on for any such purpose. The plaintiff had offered and read, along with his other evidence in chief, a letter dated January 8th, 1867, which was relied on as a promise within ten years to defeat the statute of limitations, and it fully appears that this last letter was the only one relied on for that purpose. The other two letters objected to were offered in rebuttal of the defendant's other defense, which asserted that the note had been paid or discharged, as is set forth in the answer. They certainly tended to rebut that defense and were admissible for that purpose. The other objection to the letters was, that they tended to contradict the evidence given by the defendant, by showing that he had made different statements at other times, and that no foundation was laid for said impeachment.

It must be remembered that the defendant not only occupied the position of a witness in the case; but he was also a party. The evidence might not be admissible if it had been offered simply to impeach a witness; but they were offered as admissions of a party which tended to disprove and rebut a defense set up and relied on by him to defeat the plaintiff's action. The defense was an affirmative defense relied on by the defendants, and the plaintiffs certainly had a right to rebut this defense by the admissions of the defendant, without any reference to any impeachment of the defendant as a witness, and the letters were properly received for that purpose.

Warlick v. Peterson.

It is next insisted that two of the instructions given to the jury on the part of the plaintiff, were improperly given, and that the judgment ought to be reversed for that reason.

By the first of these instructions the jury are told, "That the acknowledgment of indebtedness contained in the letter of January 8, 1867, offered in evidence, is sufficient to prevent the bar of the statute of limitations, and if the jury find from the testimony in the case, that the defendant wrote and signed said letter on the said 8th day of January, 1867, containing the acknowledgment therein of defendant's indebtedness to the plaintiff, the jury will find for the plaintiff the amount of such indebtedness, as shown by the evidence; unless it further appears to the satisfaction of the jury, that the defendant has heretofore assigned or transferred, in payment and satisfaction of plaintiff's demand against him, certain claims, notes and demands, or has otherwise paid plaintiff's claim."

The second instruction is substantially like the first, except that the jury are further told by said instruction, that the burden of proving such payment and discharge rests upon the defendant, and defendant must show by the weight of evidence and to the satisfaction of the jury, that such payment has been made; and unless defendant has so shown, they must find for the plaintiff, and in determining on which side the testimony in reference to payment preponderates, they may take into consideration the reasonable probabilities of the truth or falsity of the evidence on either side.

The grounds of objection to these instructions are, first, that the letter read in evidence and referred to in the instructions did not contain a sufficient acknowledgment of the debt sued on, to take it out of the bar of the statute of limitations; and secondly, that the instructions assumed that the acknowledgment contained in the letter referred to the debt in controversy, when that fact should have been submitted to the jury. The letter in question referred in clear terms to a note of the defendant, which was due and unpaid, to the plaintiff, and also a note which was also executed by the defendant to a third per-

son, and upon which the plaintiff was the security of the defendant; and after speaking of the prospects of the defendant, and his chances for making money in the future, the letter proceeded to express the hope that he would be able to make something over a support for his family, in which event he would keep all he could for the plaintiff. This, we think, was a sufficient acknowledgment to relieve the case of the defense of the statute of limitations, provided it referred to the note sued on. There was nothing equivocal or uncertain as to the acknowledgment of an indebtedness, or of the defendant's willingness to pay. The only thing left uncertain was as to the time at which he would be able to pay.

The present case comes almost exactly within the principle recognized in the case of Carr's Adm'r vs. Hurlbut's Adm'r, (41 Mo., 264). Whether the acknowledgment or promise relied on is sufficient to take the case out of the operation of the statute, is a question for the court; but as to whether the promise or acknowledgment referred to the debt in controversy, is a question of fact for the jury. (See the case last referred to, and cases there cited.)

The instructions given in this case improperly assumed that the acknowledgment of indebtedness referred to the debt in controversy; that fact ought to have been left to the jury. The latter part of the second instruction is also in the nature of a comment on the law of evidence applicable to the case; but while the language of the instruction may be improper, the judgment would not be reversed on that account alone.

The instructions refused by the court on the part of the defendant, were properly refused, as they seemed to leave a question of law to be determined by the jury. As already stated, it was for the court to say whether the promise or acknowledgment was sufficient to avoid the bar of the statute of limitations.

It is lastly objected, that the verdict of the jury and judgment of the court are excessive; that more interest was calculated on the note than was justifiable under the law.

 Reid v. Piedmont & Arlington Life Ins. Co.

We see no error of this kind in the record. The court instructed the jury, at the request of the defendant, that they should exclude from their verdict all interest which might have accrued on the note in controversy, during the continuance of war between the government of the United States and of the Confederate States. By an examination of the amount of the verdict, it will be found that the jury calculated no interest for the entire time included between the commencement and final conclusion of the war, and that the jury strictly followed the direction of the court on this subject. There is certainly no just ground of complaint in this particular, on the part of the defendant.

For the reason that the court improperly excluded the depositions offered in evidence by the defendant, and improperly instructed the jury as before indicated, the judgment must be reversed, and the cause remanded; the other judges concur.

— O —

ROSALINE REID, Respondent, vs. PIEDMONT & ARLINGTON LIFE INSURANCE Co., Appellant.

1. *"Family physician"*—*Phrase defined, not technical.*—The phrase, "family physician," is one that is in common or ordinary use, and has no particular, definite or technical signification. It signifies one who usually attends and is consulted by the members of a family in the capacity of a physician; it means one who is accustomed to attend, and not one who has occasionally attended.
2. *Evidence—Questions as to freedom from symptoms of disease.*—The question asked of a witness, whether a person was "in good health and free from symptoms of disease," is improper as involving a mere conclusion. The facts should be stated so that it could be seen on what the opinion was predicated.
3. *Insurance, life—Declarations of insured after issue of policy.*—Declarations of the insured as to his health, made after the issuing to him of a policy of life insurance, are not competent evidence.
4. *Insurance, life—Instructions—Evidence.*—An application for life insurance which was made a part of the policy, contained the following question: "Name and residence of your own or family physician, or of the medical attendant who last rendered you professional services?" This was answered, "Have none." An instruction was offered on the trial in a suit on this policy

Reid v. Piedmont & Arlington Life Ins. Co.

declaring that "the plaintiff cannot recover, for the reason that deceased received medical attendance from a physician named, prior to the date of the application." *Held*, that the instruction was properly refused, because it undertook to tell the jury that they must find in a particular way, without regard to any testimony in the case but that of witnesses who supported the defendant's side.

5. *Practice, civil—Trials—Instructions, abstract, improper.*—Instructions which do not respect the specific facts bearing on the particular case, are improper even though they correctly state abstract propositions of law.

ON MOTION FOR RE-HEARING.

6. *Practice, civil—Appeals—Supreme Court will not weigh evidence.*—The Supreme Court, in law cases, will not weigh the evidence, and will not interfere with a verdict if there is any evidence to support it.
7. *Practice, civil—New trials—Evidence, weight of—Duty of trial court.*—It is the duty of the trial court, in passing upon motions for new trials, to weigh the evidence; it has opportunities to see the witnesses; to form opinions as to their veracity; to observe whether they are biased or prejudiced; and can also determine whether any improper influences operated on the jury in producing their verdict: and where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, should never hesitate to grant a new trial.

Appeal from St. Louis Circuit Court.

John Wickham with Crews and Laurie, for Appellant.

I. The application for insurance forms part of the contract, and the statements contained in it are warranties. (*Daniels vs. Hudson R. Fire Ins. Co.*, 12 Cush., 416; *Loehner vs. Home Mut. Ins. Co.*, 17 Mo., 255; *Miller vs. Mut. Ben. Ins. Co.*, 31 Iowa, 231; *Bliss Life Ins.*, pp. 53, 54, 55; *May on Ins.*, 582.)

II. Affirmative warranties are conditions precedent, their truth must be pleaded by the assured, and the burden of proof rests on the plaintiff to show that they have been strictly complied with. (*Wilson vs. Hampden Ins. Co.*, 4 R. I., 159; *Miller vs. Mut. Ben. Life Ins. Co.*, 31 Iowa, 231; *Craig vs. U. S. Ins. Co.*, 1 Pet. R., 416; *Campbell vs. New England L. Ins. Co.*, 98 Mass., 402; *McLean vs. Connecticut M. Ins. Co.*, 100 Mass., 474.)

When there is any concealment or false statement of facts existing at the commencement of the risk, the policy never

Reid v. Piedmont & Arlington Life Ins. Co.

takes effect, the risk is never assumed. (*Obermeyer vs. Globe M. Ins. Co.*, 43 Mo., 579.)

III. It is immaterial whether the statements made in the application in this case be held to be warranties or representations, and even though the court, following the tendency of the recent decisions, should hold them to be representations, still the result would be the same; for the same line of decisions uniformly hold, that when an unlawful answer is made to a question which is, beyond doubt, material to the risk, policies obtained by such deceit are null and void. (*May Ins.*, p. 582-590; *France vs. Aetna Life Ins. Co.*, 2 Ins. L. Jour. 657; *Kelsey vs. Universal Life Ins. Co.*, 35 Conn. 238; *Miles vs. Conn. Ins. Co.*, 3 Gray, 580; *Vose vs. Eagle Life & Sr. Ins. Co.*, 6 Cush., 42; *Barrett vs. Saratoga C. Ins. Co.*, 5 Hill, 188; *Anderson vs. Fitzgerald*, 4 House of Lords, 484; *Babbitt vs. Liverpool & London Ins. Co.*, Ins. Law Jour., April, 1872.)

A. J. P. Garesche, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

Plaintiff, as widow of Thomas J. Reid, brought this action on a policy of life insurance for \$3,000 issued by the defendant.

The answer denied that the plaintiff or her husband complied with the conditions of the policy, and set up that the policy was obtained by fraud and misrepresentation in the application upon which it was founded, and which formed a part thereof; that the misrepresentations consisted of false statements and concealments by Thomas J. Reid, the party insured, in his application, in regard to the condition of his health at that time and prior thereto, and as to whether or not he had a family physician or medical attendant.

The replication denied all these averments made in the answer.

By the pleading it stands admitted that the application for insurance was made, by express agreement, a part of the contract, and the statements, therefore, became warranties, and

hence, the question to be determined upon the trial was, whether they were true or false. The issue was one of fact, and if no error was committed in giving or refusing instructions, or in passing upon the admissibility of testimony, the verdict is conclusive. Among other inquiries in the application is the following: "Name and residence of your own or family physician, or of the medical attendant, who last rendered you professional service?" To this, the assured answered that he had none.

Upon the examination of Dr. Roberts, who was a witness, the defendants propounded the interrogatory: "What is the meaning of the phrase 'family physician?'" The question was objected to, and the objection sustained. The question was addressed to the witness, as an expert, upon the theory that the expression had a technical signification. But this theory is not maintainable. The phrase "family physician" is one that is in common or ordinary use, and has no particular, definite or technical signification.

In *May on Insurance*, (§ 304.) the authorities are collected, and it is announced as the settled law, that a family physician is the physician who usually attends and is consulted by the members of a family, in the capacity of physician. And where the usual medical attendant is inquired for, the one who has been accustomed to attend and not the one who has occasionally attended, should be mentioned.

This question was much discussed in a recent case in Minnesota, where the majority of the court held, that the phrase "family physician," in common use, was not a technical phrase, and that in their opinion, it might be sufficiently defined as signifying the physician who usually attended and was consulted by the members of the family in the capacity of a physician; that a person who usually attended and was consulted by the wife and children of the assured as a physician, would be his family physician although he did not usually attend on, and was not usually consulted as a physician by the assured, himself. Where there is no doubt about the fact of the physician's employment, or that he usually attended the family,

Reid v. Piedmont & Arlington Life Ins. Co.

the rule above laid down may be quite sufficient; but when it is uncertain whether there was any physician or not, then it becomes a question of fact, and should be submitted to the jury for their finding. (*Gibson vs. Am. Mut. L. Ins. Co.*, 37 N. Y., 580.)

The question put to the witness was improper, and was rightly excluded. The phrase had no technical meaning, and was not a subject calling for an opinion from an expert.

It is also complained of, that the court ruled out as incompetent, the question to the same witness, as to whether or not the assured was at the time of making the application, in good health and free from any symptoms of disease. This question involved a mere conclusion and was objectionable. The facts should have been asked, in order that it might have been seen on what the inference or opinion was predicated. But, under any circumstances, the defendant was not injured by the ruling of the court. It was permitted to give fully and unrestrictedly all the evidence it had relating to the physical condition, symptoms of disease, and general health of the assured at the time the application was made. The declarations of the insured, as to his health, made subsequent to the issuing of the policy, were rightfully rejected. (*Mulliner vs. Guardian Mut. L. Ins. Co.*, 1 N. Y. Sup. Ct. Rep., 448.)

There are no more questions in reference to evidence, deserving of notice, and it only remains to consider the instructions.

The following instructions asked by the defendant were refused: "The court instructs the jury that the plaintiff cannot recover, for the reason that it appears from the evidence, that Thomas J. Reid received medical attention from Dr. E. K. Roberts, prior to the date of the application for insurance. The court declares the law to be, that warranties must be exactly and literally true, and when the answers of the party insured, in an application for life insurance, are warranties and form a part of the contract of insurance, any misstatement or concealment whatever, in regard to the matters and

things therein inquired of, will render the policy null and void, even though such mis-statement or concealment, may be innocently or ignorantly made."

The subjoined instructions, all asked by the defendant, were given: "If the jury believe, from the evidence, that Thos. J. Reid made the application for insurance admitted in evidence in this case, and that in said application said Reid was asked the following question, to-wit: "Name and residence of your own or family physician, or of the medical attendant, who last rendered you professional services," and that said Reid answered said question as follows, to-wit: "Have none;" and if the jury further believe, from the evidence, that such answer was in any respect, untrue, then the jury are instructed that plaintiff cannot recover. If the jury believe, from the evidence, that Thos. J. Reid made the application for insurance admitted in evidence in this case, and that the following question was asked said Reid, in said application, to-wit: "Have you had, since childhood, fistula or consumption, if so, which and how recently?" and that said Reid answered said question as follows, to-wit: "No;" and if the jury further believe, from the evidence, that said answer was in any respect untrue, then the jury are instructed that they must find for the defendant. If the jury believe, from the evidence, that Thomas J. Reid made the application for insurance admitted in evidence in this case, and that in said application, said Reid was asked the following question, to-wit: "Have you had an habitual cough, or any disease, or is any suspected?" And that said Reid answered said question, to-wit: "No;" and if the jury believe from the evidence, that said answer was in any respect untrue, then the jury are instructed that they must find for the defendant.

If the jury believe from the evidence, that Thos. J. Reid made the application for insurance admitted in evidence in this cause, and that said application contained the following question, to-wit: "Have you ever had any serious illness, local disease, affection, or personal injury, if so, of what na-

ture, and when was it?" And that said Reid answered said question as follows, to-wit: "No;" and if the jury further believe from the evidence, that said answer was in any respect untrue, then the jury are instructed that they must find for the defendant.

If the jury believe, from the evidence, that Thomas J. Reid made the application for insurance admitted in evidence in this cause, and that said application contained the following question, to-wit: "Are you now in good health, and free from any symptoms of disease?" And that said Reid answered as follows, to-wit: "I am;" and if the jury further believe, from the evidence, that said answer was in any respect untrue, then the jury are instructed that they must find for the defendant.

If the jury believe from the evidence, that Thos. J. Reid made the application for insurance admitted in evidence in this case, and that said application contained the questions and answers made thereto by the said Reid mentioned in defendant's instructions numbered one, two, three, four and five, then the jury are instructed that the matters and things so inquired about are material, and the question of their materiality is not to be considered by the jury. Nor is it necessary that defendant should show that the death of Thos. J. Reid was occasioned by any of the diseases therein mentioned.

The burden of proof is on the plaintiff, and to entitle her to recover a judgment against the defendant, she must show by a preponderance of testimony, that each and every one of said answers are true in every respect. If the jury believe from the evidence, that Thos. J. Reid made the application for insurance admitted in evidence in this case, and that said application contained the questions and answers thereto, and by the said Reid, mentioned in defendant's instructions numbered one, two, three, four and five, then the jury are instructed that said answers are warranties and formed a part of the contract of insurance between the said Reid and defendant; and if the jury believe from the evidence, that any of said answers are untrue in any

respect, whatever, whether by ignorance, mistake or otherwise, they must find for defendant."

These instructions are so full and complete, and cover every point of law raised in the case in a manner so favorable to the defendant, that it is difficult to perceive any substantial ground, whatever, upon which a reasonable objection can be based. The action of the court in refusing the first instruction was correct. It undertook to tell the jury that they must find in a certain way, without regard to any testimony in the case, but that of those witnesses who supported the defendant's side. It was wholly wrong; it invaded the province of the jury and took the whole case out of their hands. It should have been drawn in different terms and submitted the question, whether or not the jury believed from the evidence that Reid had received the medical attention prior to the date of the application.

The second instruction refused was a mere abstraction, and more in the nature of a treatise on law than a declaration respecting the specific or particular facts bearing on the case. But the instructions given, presented the case so strongly and in such a favorable attitude for the defendant, that there was nothing left to be done, and no further ground of complaint was furnished. They singled out and enumerated every inquiry and answer contained in the application, relating to the matter in contention, and told the jury that if anything contained in any answer was untrue in any respect, it avoided the policy and that the verdict must therefore be for the defendant. To give particular emphasis to this view of the law, the jury were directly instructed that the answers constituted warranties, and that if any of the answers were untrue in any matter whatever, without regard as to how the untruth originated, whether by ignorance or mistake, or from any other cause, then the plaintiff could not recover.

The case was strongly contested, there was much evidence given on both sides, and it is evident from the verdict, that the jury must have believed that the answers of the assured in the application were entirely true in every respect. This

Reid v. Piedmont & Arlington Life Ins. Co.

being the case, we will in nowise interfere, or disturb the finding. The declarations of law could not have been more favorable for the defendant, and the questions of fact were exclusively for the jury.

Judgment affirmed; the other judges concur.

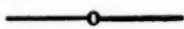
ON MOTION FOR RE-HEARING WAGNER, Judge, delivered the opinion of the court.

Defendant has filed its motion for a re-hearing in this case, on the ground that the verdict of the jury was unsupported by the evidence and in direct conflict with it. It is needless to repeat what has been so often said, that this court will not undertake to weigh the evidence. Such a course would be entirely inappropriate in an appellate tribunal. The opportunity for judging of the credibility of witnesses is entirely denied to us. Hence, when there is any evidence to support the verdict we cannot interfere. The evidence may be slight, and it may be contradictory, but we cannot tell the proper credit that should be attached to it. In this cause there was room for doubt in reference to the points insisted on, and, therefore, we cannot interfere on that ground. In looking into the judgment, the amount seems to be for too much. Plaintiff was only entitled to recover the face of the policy with six per cent., and the verdict seems to be in excess of this amount by \$151.00; the jury, undoubtedly, calculated the interest at ten per cent. This they had no right to do. This might have been rectified in the court below, by the plaintiff remitting the excess, but as she did not do so, she will be required to pay the costs of this appeal, and upon her entering a remittitur of the excess of \$151, the motion will be overruled.

But in this connection, it is well enough, to make another remark. Constant complaints are reaching us that in some of the Circuits the rule adopted here is followed, and that the judges consider themselves bound thereby. But this is founded in an entire misapprehension. The trial courts have opportunities which we have not. In witnessing and presiding over the trial, they are put in possession of facts which

we cannot possibly attain. They see the witnesses ; can form an opinion respecting their veracity ; can observe whether they are biased or prejudiced ; can notice their willingness or unwillingness, and a great many other circumstances which it is impossible to transfer to paper. They can also form a correct conclusion as to whether any improper influences operated on the jury in producing the verdict. All these considerations render it peculiarly proper that the question of granting new trials, on account of the verdict being against the weight of testimony, should be exclusively exercised by the court trying the cause, and where the trial court is of the opinion that the verdict is not supported by the evidence, or is against the weight of evidence, it should never hesitate in exercising the power and giving the aggrieved party a new trial.

The motion is overruled with the modification above stated ; the other judges concur.



E. A. FLETCHER, Respondent, *vs.* GEORGE R. COOMBS, *et al.*,
Appellants.

1. *Judgments—Erroneous entries—Corrections nunc pro tunc, at subsequent term—Evidence sufficient to authorize—Presumption.*—The rule is well settled in this State, that where the clerk of a court fails to enter a judgment, or enters up a wrong judgment, the court has the power to correct the error or omission by having the proper judgment entered up by the clerk, at any time at the same or a subsequent term. But in cases where *nunc pro tunc* entries are made, the record should in some way show, either from the judge's minutes or otherwise, the facts which would authorize the entry. Where a judgment is entered *nunc pro tunc* by order of the court, the presumption is in favor of the action of the court, and that it was based upon sufficient evidence.

Appeal from Adair Circuit Court.

Greenwood & Pickler, for Appellants.

I. If judgment is given against all the sureties, it must be good as to all or bad as to all, as a judgment is an entirety.

Fletcher v. Coombs, et al.

(Rush vs. Rush, 19 Mo., 441; Randalls vs. Wilson, 24 Mo., 76; Smith, Adm'r vs. Rollins, 25 Mo., 408.) Judgment rendered against a party after his death is void. (Wagn. Stat., 1050, §§ 7, 8.) The only time at which the plaintiff could have filed his motion to correct the judgment, was during the term at which it was rendered. (Smith vs. Best, 42 Mo., 185; Huthsing vs. Maus, 36 Mo., 101.) The court had no further power over this judgment, after the close of the term at which it was tried. (Wilson vs. Boughton, 50 Mo., 18, and cases cited.)

Harrington & Cover, for Respondent.

I. The motion to correct the judgment is in the nature of a writ of error *coram nobis*. The judgment included the name of Joseph T. Dennis, one of Coombs' sureties on his appeal bond, which was an error in fact, and had to be corrected in the Circuit Court, and can be done at any time. (Callaway vs. Nifong, 1 Mo., 159; Powell vs. Scott, 13 Mo., 458.) A judgment rendered against a defendant after he is dead, is not void, but at most only voidable. (Coleman vs. McAnulty, 16 Mo., 173; latter part of opinion on page 176, in point; Warder vs. Tainter, 4 Watts, 278, in point.) The judgment was through mistake rendered against Dennis; the court did not order judgment against him; his name was included in the judgment by mistake of the clerk through neglect and inattention, and the court had the right to correct. (Gibson vs. Chouteau, 42 Mo., 171; Turner vs. Christy, 50 Mo., 145; Horstkotte vs. Menier, 50 Mo., 158.)

The statute provides, that for any informality in entering judgment, or making up the record, the judgment shall not be affected. (Wagn. Stat., 1036, § 19.) Also that all defects and informalities, etc., not being against the right and justice of the matter of the suit, nor altering the issues, shall be amended by the court. (Wagn. Stat., 1037, § 20.)

VORLES, Judge, delivered the opinion of the court.

The plaintiff in this case commenced a suit against the defendant, Geo. R. Coombs, before a justice of the peace, in

Adair county, to recover a judgment on a promissory note, for about one hundred and twenty dollars.

The plaintiff recovered a judgment before the justice, from which the defendant appealed to the Adair Circuit Court, executing an appeal bond at the time, in which bond he was joined by P. F. Greenwood, C. J. Sloan, J. D. Dennis, and seven others, who executed the appeal bond as sureties for Coombs. In the Adair Circuit Court the plaintiff again recovered a judgment, which was rendered against defendant, Coombs, and all of the sureties on the appeal bond, including said J. D. Dennis.

An execution was afterwards issued on this judgment, and made returnable to the next succeeding term of the said Circuit Court after the rendition of the judgment.

At the term of the court to which the execution was returnable, the defendants appeared in court and moved the court to set aside the judgment rendered in the case at the previous term, and to quash the execution issued thereon, assigning as grounds for said motion, that at the time of and previous to the rendition of the judgment, one of the parties against whom the judgment was rendered, to-wit: J. D. Dennis, was dead; that the execution was issued against all of the defendants in the cause, including said Dennis, who had for a long time been dead, and that, by virtue of the execution, the sheriff had levied on the property of said Dennis, and was about to sell the same; and that the judgment and execution, the one being rendered, and the other having been issued against a man who was dead at the time, were void. The defendants filed affidavits with the motion in support thereof.

It is not disputed that Dennis was dead at the time the judgment was rendered, and that his property was levied on by the sheriff, and advertised for sale.

After this motion had been filed by the defendants, and before it was disposed of, the plaintiff filed a motion asking the court to correct the judgment rendered in the case at the previous term. The plaintiff in his motion represented to

the court, that Joseph D. Dennis was one of the sureties for defendant, Coombs, on the appeal bond, executed and filed before the justice of the peace; that after the appeal was perfected, and before the judgment was rendered in the Circuit Court, said Dennis departed this life; that the case was tried in the Circuit Court at the June term thereof, for the year 1873, and judgment rendered against defendant, Coombs, and the sureties on the appeal bond, including said Dennis; that at the term when the judgment was rendered, the clerk of the court was notified of the death of said Dennis, and directed to render no judgment against him; that the court did not find against said Dennis, nor did the court render judgment against him, or authorize the clerk to insert his name in the judgment. The court was therefore asked to strike the name of said Dennis from the judgment, and that the same may be made to conform to the judgment rendered by the court.

The court sustained the motion to correct the judgment, and had an order made of record, correcting the judgment in conformity to the facts set forth in the motion. To this action of the court the defendants at the time excepted.

After the plaintiff's motion to correct the judgment had been sustained, the motion made by defendants to set aside the judgment and quash the execution, was taken up and considered. The court overruled the motion, so far as it asked the court to set aside and vacate the judgment; but sustained the same as to the quashing of the execution, and made an order directing the execution to be quashed, etc.

To the action of the court in refusing to vacate the judgment, the defendants again excepted, and after an unsuccessful motion for a re-hearing they appealed to this court.

The only question presented for the consideration of this court, is as to the propriety of the action of the court, in entertaining the motion filed by the plaintiff to correct the judgment, and in sustaining the same at a term of the court next after the term at which the judgment was rendered. If the court had the power to correct the judgment at the term

after the one at which it was rendered, it can make no difference in the case as it now stands, whether the judgment, as originally rendered, was void or only voidable.

The rule is well settled in this State, as well as elsewhere, that where a clerk fails to enter a judgment, or enters up a wrong judgment, the court has the power to correct the error or omission, by having the proper judgment entered up by the clerk at any time. Courts always at a subsequent term correct mere forms in its judgments, or correct any mere clerical error of its clerk, so as to conform the record to the truth. (Gibson vs. Chouteau's Heirs, 45 Mo., 171; Benoist vs. Christy, 50 Mo., 145; Horstkotte vs. Menier, 50 Mo., 158.) But in cases where *nunc pro tunc* entries are made, the record should in some way show, either from the judge's minutes or otherwise, the facts which would authorize the entry. In the present case the court, upon the hearing of the motion, finds the facts to be, that no judgment was ever ordered against Dennis, and that the clerk of the court had inserted his name in the judgment by mistake and without authority.

The evidence upon which this finding was made and the judgment corrected, does not appear in the record of the case, and we are asked to assume that the finding of the court and the order made, correcting the judgment, were made upon insufficient evidence.

We think that the presumption should be (in the absence of any facts shown to the contrary) in favor of the action of the court. We cannot assume that the court acted without sufficient or proper evidence, and must therefore presume that enough appeared on the judge's minutes, or otherwise on the record, to justify or authorize the judgment or order rendered or made by the court.

The judgment will be affirmed; the other judges concur.

Tipton v. Burton.

DAVID TIPTON, Respondent, vs. JESSE BURTON and JOHN BURTON, Appellants.

1. Judgment affirmed.

Appeal from Adair Circuit Court.

Ellison & Ellison, for Appellants.

Harrington & Cover, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

The plaintiff brought this suit to recover the value of certain household furniture and millinery goods, alleged to belong to him, and levied on and sold under execution, at the instance of the defendants, as the property of one Livingston.

The facts appeared to be, that the plaintiff, in order to enable his two sisters to make a livelihood, had purchased a stock of millinery goods and some household furniture, and set them up in this business at Kirksville. One of the sisters, a widow at the time of the purchase, married a man named Livingston, who, it seems, was indebted to the defendants, before his marriage, to the amount of \$90, or thereabouts. The defendants ordered their execution to be levied on this property of Mrs. Livingston, and upon the constable declining to do so without an indemnifying bond, gave one. The property was sold, and the plaintiff, the brother of Mrs. Livingston, brings this action to recover of them the value of the property sold.

The only questions in the case were, whether the plaintiff retained his ownership of the property which it was conceded he bought and paid for with his own money, or had given it to his sisters absolutely, and whether the defendants had authorized the execution sale or ordered it, so as to make them responsible in this action.

Upon these points various instructions were asked and given, and still more refused. Upon the two points the questions of fact were put to the jury, and no objections are made to the instructions. The jury found for the plaintiff, and assessed his damages at the value of the goods.

Various instructions were asked, founded upon the 5th section of our statute concerning fraudulent conveyances; but as the defendants were not creditors of Mrs. Livingston or her sister, they had no application to the case.

Various other technical objections are taken to the form of the action, but if we are still to look into the nice distinctions between trover and trespass and detinue, the total abolishment of all such niceties and the declarations of our legislature long since made, that the only action here is a civil action, will have been made in vain.

The verdict was manifestly a just one, and the judgment must be affirmed.



ELLIOTT T. MERRICK, *et al.*, Plaintiffs in Error, *vs.* HIRAM L. PHILLIPS, Defendant in Error.

1. *Bills and notes—Consideration—Innocent holder.*—The consideration of a negotiable promissory note, in the hands of an innocent holder for value, cannot be inquired into, and before the consideration can be impeached it must be first shown that the holder had notice of the lack of consideration.

Error to Putnam Circuit Court.

J. E. Withrow with W. A. Shelton, for Plaintiffs in Error.

Hyde & Christy, for Defendant in Error.

WAGNER, Judge, delivered the opinion of the court.

This was an action by the plaintiffs, as assignees of a negotiable promissory note, against the defendant. The note was executed to one Partridge, on the 5th day of November, 1870, was due and payable nine months after the date thereof, and was by Partridge, on the 1st day of July, 1871, assigned to plaintiffs.

The note was given for fruit trees and shrubbery, and the defense set up was a partial failure of consideration. It was averred in the answer, that the plaintiffs, when they took the

note, had notice of the failure of consideration, and also that the assignment was made for the purpose of precluding a just and lawful defense. These charges were denied in the replication.

For the purpose of showing notice on the part of the plaintiffs, A. J. Haskinson was introduced, and was permitted to testify, against their objection, that in the fall of 1870, about the last of October or the first of November, he was in plaintiff's office, and that Partridge was there, and that he learned from their conversation that they were all partners, or interested in the St. Louis Stone Ware Company. Witness thought Stickney was not in the office, but believed that Merrick was. Whilst in the office he had considerable conversation with Partridge about his sale of fruit trees, and Partridge stated that there seemed to be considerable dissatisfaction on the part of those who had ordered trees. Witness did not know whether either of the plaintiffs heard what Partridge said about the trees; he thought Merrick was in the office at the time, but was not certain.

After this evidence was admitted, the court then permitted the deposition of the defendant to be read to the jury, tending to prove the issue raised in his answer, and a verdict was rendered in his favor.

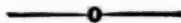
The court erred in holding the evidence of Haskinson a sufficient foundation to warrant the evidence impeaching the consideration of the note. His conversation with Partridge was before the note was given. His understanding from the parties, that they were interested together in the Stone Ware Company, was entirely foreign to this transaction, and had no relevancy to the case.

At best, Partridge only said that there appeared to be considerable dissatisfaction on the part of those who had ordered trees, but no particular allusion was made to the lot which is the subject of this dispute or litigation. But even admitting that this might have been sufficient to have put a prudent man on his guard, still there is no evidence that either of the plaintiffs were apprised of the fact or heard any of the conversation.

 Royer, et al. v. Fleming, et al.

The witness distinctly states that one of the plaintiffs was absent, and he does not know whether the other heard the conversation or not. The evidence was utterly insufficient as a foundation for charging the plaintiffs with notice, and as the note was negotiable and assigned before maturity, no inquiry into the consideration could be had till it was shown that plaintiffs were not innocent purchasers. (*Horton vs. Bayne*, 52 Mo., 531; *Corby vs. Butler*, 55 Mo., 398; *Bennett vs. Torlina*, 56 Mo., 309.)

Wherefore the judgment should be reversed and the cause remanded; the other judges concur.



**AMOS ROYER, et al., Respondents, vs. JOHN FLEMING, et al.,
Garnishees of SMITH, et al., Appellants.**

1. *Practice, civil—Pleadings—Garnishment—Prior garnishment—Evidence as to, when improper.*—In a garnishment proceeding, the garnishee cannot prove a prior garnishment to recover the same debt, where no such issue is presented by the pleadings.
2. *Practice, civil—Instructions.*—An instruction calculated to mislead the jury, or not based on evidence, is improper.
3. *Garnishment—Compromise of demand against garnishee, growing out of creditor's non-feasance—Fees and costs.*—A. was garnished, as debtor of B., on a contract for work and labor. In defense he showed that he had been called upon to pay certain debts owing by B. to his laborers, and had compromised them at 50 cents on the dollar: *Held*, that he could off-set against B.'s demand only the amount actually paid on such compromise. But if the terms of the compromise included fees and costs of the laborers, which were paid by A. and did not with the 50 cents exceed the amount due to the laborers by B., the fees and costs could be added to the off-set.
4. *Judgment—Superfluous matter.*—It is proper to strike superfluous matter from a judgment so that a proper judgment may be left.

Appeal from Schuyler Circuit Court.

A. J. Bader with Hughes & Hughes, for Appellants.

McColdrick & Caywood with Edw. Higbee, for Respondents.

VORIES, Judge, delivered the opinion of the court.

In November, 1871, the plaintiffs commenced a suit in the Schuyler Circuit Court, against Patrick Smith and John Smith, to recover the amount of a demand against them for the sum of \$408.88. An attachment was issued in said suit, upon which the defendants in this proceeding were garnished as the debtors of said defendants, Smith and Smith. The garnishment was served on the 28th day of November, 1871. Interrogatories were properly filed at the return term of the writ. It is admitted by the parties, that the plaintiffs prosecuted their suit against Smith and Smith to final judgment, in which they recovered the amount of the demand sued for.

The garnishees, Fleming and McCarthy, appeared to the garnishment, and filed an answer to the interrogatories filed by plaintiffs, in which they denied their indebtedness to Smith and Smith in any sum, or on any account whatever.

The plaintiffs filed a denial of the answer of the garnishees, and charged that the said Fleming and McCarthy were indebted to Smith and Smith at the time of the service of the garnishment, in the sum of one thousand dollars for work and labor performed in grading, grubbing and clearing done by said Smith and Smith, under a contract with said garnishees for the grading, etc., for a section of the Missouri, Iowa and Nebraska Railroad, in the county of Schuyler.

The said garnishees, Fleming and McCarthy, filed their replication to said denial of plaintiffs, in which they admitted, that said Smith and Smith were sub-contractors under them, and, as such, were engaged in grading and constructing the line of the Missouri, Iowa and Nebraska Railway; but they aver that said Smith and Smith performed the work performed by them, in grading and constructing the road bed for said railway, under a special contract to perform the whole of the work on section 59 of said road, and have the same completed in a manner and at a time named in said contract, and for prices therein set forth. The said defendants then aver that after said Smith and Smith had partly performed said work, they abandoned the same and never complied with

their contract, and that the defendants were put to great trouble and expense in completing said work. The defendants then averred that they had fully paid said Smith and Smith, and were compelled to pay the laborers employed by said Smith and Smith, and who performed work in grading said road under said Smith and Smith, for all work performed by said Smith and Smith under their contract, setting out all the particulars of the payments made by them, in which it is shown that Smith and Smith had performed work under said contract, amounting to about three thousand dollars, all of which, it was averred, had been fully paid, setting forth the particular payments, etc. The defendants then averred, that they did not owe said Smiths on said contract or otherwise at the time of the service of the garnishment, any sum or amount whatever.

Upon the issues, thus presented, the case was tried in the Circuit Court by a jury. Evidence was introduced on the part of the plaintiffs which tended to prove that Smith and Smith had done work for the defendants to the value or amount of over three thousand dollars, and that defendants were still indebted to Smith and Smith for work done in the sum of several hundred dollars. The evidence on the part of the defendants strongly tends to prove that Smith and Smith had not complied with their contract in grading the section of the road contracted for, and that they had been paid and overpaid all that they were entitled to receive by virtue of their contract for the work done.

The defendants then offered to prove, that Wesley Farrell and Ebenezer Birney had, prior to the service of the garnishment in this case, garnished defendants as being indebted to said Smith and Smith in the sum of \$430. The court refused to admit said evidence and the defendants excepted.

At the close of the evidence, the court, at the request of the plaintiffs, instructed the jury as follows: "If the jury believe that Fleming and McCarthy reserved at the several monthly payments the 15 per cent. reserve, then said F. and McC. are not entitled to receive a credit for work subse-

quently done by F. and McC., or on account of the right to reserve said 15 per cent." This instruction was objected to by the defendants and exceptions saved.

The defendants then moved the court to instruct the jury as follows: "1st. The court instructs the jury that Farrell and Birney have garnished defendants for the sum of \$434, and in making up their verdict they will allow defendants a credit for said amount with interest, at the rate of six per cent. per annum, from the 18th day of January, 1873, up to date." "2nd. If the jury believe, from the evidence, that Henry Shaw was the engineer in charge of the work on said section 59, then, by the terms of the written contract read in evidence, he was the agent of Smith and Smith, and also of Fleming and McCarthy, and that his final estimate as to the entire amount of work done in completing said section, is conclusive upon both parties." "3rd. If the jury believe from the evidence that the laborers on the road filed claims against the Missouri, Iowa and Nebraska Railway Co., for the last thirty days labor, and obtained judgment on the same against the company, then Fleming and McCarthy were bound to pay off said judgments, and are entitled to a credit equal to the amount of said judgments, notwithstanding they compromised the same at fifty cents on the dollar."

These instructions were each and all refused by the court, and the defendants excepted.

The court then, of its own motion, gave the jury the following instructions which were objected to by the defendants. "3rd. If they find Fleming and McCarthy, in their monthly payments, paid to Smith and Smith's laborers the amount due Smith and Smith, less the amount of demands against said laborers in favor of merchants with whom above laborers dealt, and less the amount of Fleming and McCarthy's account against Smith and Smith for goods and merchandise, then they owed to Smith and Smith the balance, after deducting the amounts of Fleming and McCarthy's account against Smith and Smith, and it devolves upon them to show that Smith and Smith have been paid that balance; otherwise they are liable to

plaintiffs in this case for the amount of that balance, not exceeding plaintiff's debt against Smith and Smith."

"4th. If Fleming and McCarthy paid off Smith and Smith's hands for labor on a compromise at fifty cents on the dollar, that compromise inures to the benefit of Smith and Smith."

"5th. And Fleming and McCarthy are not to be allowed a credit for any more money against Smith and Smith than was actually paid by them to the hands, nor are they entitled to any credit for costs of suit or attorneys' fees in suits brought against the railway company by Smith and Smith's laborers." The defendants also saved their exceptions to the giving of these last three instructions.

The jury returned a verdict for the plaintiffs, upon which a judgment was rendered. The defendants, in proper time, filed a motion for a new trial and also a motion in arrest of the judgment, which being severally overruled by the court, the defendant again excepted and appealed to this court.

It is insisted by the defendants that the court erred in refusing to permit the defendants to prove on the trial, that they had been garnished in a suit of Farrell and Birney against Smith and Smith, prior to the service of the garnishment in this case, with a view to recover the same supposed debt in controversy in this proceeding. The court properly rejected this evidence. There was no such defense set up or relied on by the defendants in their replication or any other pleading in the case, and consequently, the evidence had no application to any issue on trial, and was properly refused.

It is next insisted that the court erred in instructing the jury as asked for by the plaintiffs. This instruction tells the jury that if defendants reserved, at the several monthly payments, the 15 per cent. reserve, then the defendants were not entitled to receive a credit for work subsequently done by them, or on account of the right to reserve said 15 per cent. It is difficult to see exactly what is intended by this instruction. By the contract between the parties, the defendants were to pay Smith and Smith monthly on estimates of the work done by them, to be made by the engineer in charge of

the work, at which payment, the defendants were authorized to retain 15 per cent. of the value of the work done as estimated by the engineer. It was further agreed that if Smith and Smith should fail to perform the whole work in conformity to their agreement, in such case the 15 per cent. should be considered as agreed compensation for damages, etc.

The evidence in this case clearly shows that Smith and Smith had failed to complete their contract, and that a small portion of the work had to be performed by the defendants, amounting to several hundred dollars, after the contract and work had been abandoned by the Smiths. Under these circumstances, if the defendants had deducted 15 per cent. from the amount estimated, to the Smiths, at the time of the monthly payments, and only paid them 85 per cent. of the amount of the estimates made for the work done, then of course the defendants would not have any right to deduct any further sum; but the instruction tells the jury that if the 15 per cent. was reserved at the time of the monthly payments, the defendants are not entitled to receive credit for work subsequently done by them. This is right, thus far, for the 15 per cent. reserved was intended to cover all damages to defendants in consequence of the non-performance of the entire contract by the Smiths; but the instruction proceeds "or on account of the right to reserve said 15 per cent." I suppose that it was intended by the last clause, to say that the defendants should not have credit on account of the power to reserve the 15 per cent., for any sum in addition to the amount reserved upon the monthly instalments. The instruction is, however, unfortunately worded, and the jury may have understood, from the last clause, that the defendants were liable for the whole amount of the work done by the Smiths, without any deduction whatever. The instruction was calculated to mislead the jury and was therefore improper.

The instructions asked for by the defendants, were properly refused by the court. The first instruction had no evidence to support it and was not founded on any issue in the case. The second instruction tells the jury, that the final es-

timate of the entire work done in completing said section is conclusive upon both parties. The estimates of the engineer were only conclusive as to the work actually performed by Smith and Smith. He could make no estimate as to the work performed by the defendants to complete the work, after it had been abandoned by the Smiths, so as to bind them. In fact such estimate would be wholly useless, as the damages for the non-performance of the contract were liquidated by the 15 per cent. reserved out of the price of the work actually done. (*Fitzgerald vs. Hayward*, 50 Mo. 516.)

The third instruction, asked for by the defendants, was clearly wrong. The defendants had the right, by their contract with the Smiths, to make payment for work done, by paying the hands who performed the labor; but they had no right to buy in these claims at half price, and thus pay off the debt they owed the Smiths, with fifty cents on the dollar. They were only entitled to credit for the amount actually paid.

The instruction numbered three, given by the court on its own motion, is difficult to understand and calculated to confuse the jury. It was intended to assert what would be a proper statement of the law of the case, and although it is rather confused or uncertain in its statements, it cannot be seen how it could injure the defendants.

The instruction numbered five, given by the court, I think is clearly wrong. It tells the jury that the defendants are not to be allowed a credit for any more money than was actually paid by them to the hands of Smith and Smith, and they are not entitled to credit for lawyers' fees or costs paid by them in settling suits commenced by the laborers of the Smiths, against the railway company. Instructions should be given with reference to the facts of the case. In this case, the Smiths had contracted to grade, etc., a section of the road bed for a railroad. Before their work was completed they abandoned their contract and left the country. Various laborers employed by them gave notice and commenced proceedings, under our statute, to recover from the railway com-

Royer, et al. v. Fleming, et al.

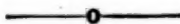
pany for their wages. These suits were compromised by the defendants in this proceeding, who had the right, under their contract with the Smiths, to pay any amount which they might owe them, to the unpaid laborers who had performed the work. The terms of the compromise were, that the defendants should pay the laborers fifty cents on the dollar of the amount due them from the Smiths, together with the costs of the suits and the fees of the lawyers who had prosecuted the demands or suits against the railway company; the whole amount being less than the amount due the laborers, the laborers releasing the balance of their claims. It seems to me, that as, the amount paid in fees which these laborers owed their attorneys was as much a part of the consideration paid to the laborers for the compromise of their claims, as the fifty cents on the dollar was, the money was really paid to the laborers, or it was paid in discharge of their debts at their request, and it was just as legitimate to pay the amount in that way as it would have been for the defendants to have paid the laborers sixty cents on the dollar, and have let them pay their own lawyers.

The judgment and verdict are also irregular. The verdict is as follows: "We the jury find for the plaintiffs, and the amount of plaintiff's claim against Smith and Smith, \$458.88; that at the date of the garnishment, Fleming and McCarthy, the garnishees, were indebted to Smith and Smith in the sum of \$608.25. Lewis C. Frester, foreman." The court in rendering the judgment, after reciting the verdict, proceeds: "Wherefore it is considered by the court that plaintiffs have and recover from said defendants the sum of \$458.88, and all costs in this suit laid out and expended, and that execution issue for said sum of \$458.88, being the sum found due from said John Fleming and Charles D. McCarthy at the date of the service of garnishment, less the amount of the judgment of Wesley Farrell and Ebenezer Birney, against Patrick Smith and John Smith, rendered by this court at the — term for the year 1873, in which case, service of garnishment was served on the defendants in this case, prior to service of garnishment in this case."

McCary, Adm'r, v. Menteer.

I confess that I do not understand what is meant by the latter part of this judgment; but the court seems to have been adjudicating in reference to the garnishment in favor of Farrell and others against the defendants in this case, after having on the trial, excluded all evidence in reference thereto, and refused all instructions on that subject. I suppose, however, that all that is said about the Farrell & Co. claim, might be stricken from the judgment and a perfect judgment be left. It may be that the clerk has been guilty of some oversight in entering up the judgment.

The judgment must be reversed and the case remanded. Judge Wagener is absent. The other judges concur.



J. V. McCARY, Adm'r of Estate of MENTEER & McCARY,
Appellant, *vs.* **ROBERT MENTEER,** Respondent.

1. *Administration—Probate Court—Appeal—Partnership estate.*—An appeal lies to the Circuit Court from the judgment of the Probate Court, on a proceeding by the administrator of a deceased partner, citing the surviving partner to show cause why he should not turn over property to the administrator.

Appeal from Madison Circuit Court.

B. B. Cahoon with Wm. N. Nalle, for Appellant.

J. D. Fox, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

The judgment of the Circuit Court in this case must be reversed. The appeal from the Probate Court was dismissed in the Circuit Court on motion, and a judgment rendered in favor of the defendant, on the ground that no appeal was allowed by the statute in such cases. The proceeding in the Probate Court was one instituted by an administrator of a deceased partner, citing the surviving partner, under the 61st and 62nd

McCrary, Adm'r, v. Menteer.

sections of our administration law, to show cause why the said surviving partner should not hand over to the administrator certain property alleged to belong to the partnership. The Probate Court, upon the answer to the citation, gave a judgment for the defendant. Upon an appeal to the Circuit Court, the appeal was dismissed without any examination into the merits of the case; and so in this court the only point presented by the record is, whether an appeal was allowable in such cases; and we think the concluding clause of the 1st section of the 8th article of our administration law, which allows an appeal "in all cases where there shall be a final decision of any matter arising under the provisions of this law," is sufficiently broad to allow the appeal in this case. The decree was final, so far as the citation was concerned, and although its results did not prevent the institution and prosecution of other proceedings in the Probate Court, the judgment of the Probate Court was final as to the one instituted. And this being so, an appeal could be taken; and this appeal having been dismissed in the Circuit Court, without any examination into the record brought up from the Probate Court, or upon a new hearing of the facts, we have no power to pass on the merits of the case, and can only remand it, to be heard below. This court can only review the action of the Circuit Court from which the appeal is taken; and as the Circuit Court simply decided that an appeal was improperly taken, we can only reverse that decision without expressing any opinion as to the merits of the case, had the appeal been allowed and the case heard. The judgment is therefore reversed and the cause remanded; the other judges concur.

Wommack v. Whitmore, et al.

HART B. WOMMACK, Respondent, vs. BENJAMIN T. WHITMORE,
et al., Appellants.

1. *Conveyances—Wills—Life estate—Power of disposition—Case stated—Estate conveyed.*—It is generally true that an absolute power of disposition over property conferred by will, and not controlled by any provision or limitation, amounts to an absolute gift of the property; but where a life estate only is expressly given, the rule is otherwise. (*Rubey vs. Burnett*, 12 Mo., 1; *Gregory vs. Cowgill*, 19 Mo., 415.) A deed conveyed property to a trustee for the special use and benefit of the grantor's wife and her children, and the *habendum* clause expressed the conveyance to be for the special use and benefit of the wife during her natural life, or her widowhood, and after her death, for the special use of her children. The deed also gave the trustee power, at the special instance and request of the wife, to sell or dispose of all of said property and apply the proceeds to the special use of the wife and children, "but specially limited to her natural life and widowhood," as aforesaid: *Held*, that the interest of the wife was limited to the use and benefit of the property during her natural life and widowhood, and that the children were invested with a title to the remainder by operation of the conveyance and not as the representatives of the wife.
2. *Partition—Action of, cannot be maintained against one in exclusive possession—Such exclusive possession must amount to actual ouster.*—An action in partition, cannot be maintained by one out of possession against one who is in actual exclusive possession of the land, asserting an exclusive title thereto. But in such cases, disseizin or an adverse possession, amounting to an actual ouster, must be shown in order to destroy the right to such action; and where it appeared that the ancestor from whom both parties derived title had a life estate in the land, and was entitled to its possession to the time of her death, and had granted to a tenant a lease of the land, which was unexpired at the time of her death, and, that after her death the defendant, as her administrator, collected the rents, and paid the taxes; and that defendant never recognized plaintiff as having any claim on the land, and that during three months which elapsed between the death of the ancestor and the bringing of the suit in partition, plaintiff never applied for or received any part of the rent: *Held*, that these facts did not constitute such an adverse holding as to amount to an ouster.
3. *Judgments—Persons not parties to record not affected.*—The interests of persons not parties to the record, cannot be affected by the judgment in the case.
4. *Descents and distributions—Life estate—Parent and child.*—Where a conveyance created a life estate in the grantor's wife, with a remainder to her children, such remainder becomes vested; and where one of the children married and died, leaving a husband and child living, and the child afterwards died, the husband, who survived, would, at the death of the tenant for life, as heir of his child, take the share his wife would have had in the property conveyed.

*Appeal from St. Charles Circuit Court.**Lackland and Broadhead, for Appellants.*

I. The defendants deny co-tenancy with plaintiff, and set up adverse possession. The defendants were in the actual adverse possession of the premises sought to be divided, and plaintiff must resort to ejectment first to try his title. In order to maintain the action of partition, the plaintiff must be in the active or constructive possession of the premises sought to be divided. The unity of possession among tenants in common is destroyed by a disseizin or actual adverse possession. There can be no constructive possession of one, where there is an actual adverse possession of another. (*Lambert vs. Blumenthal*, 26 Mo., 471; *Rozier vs. Johnston*, 35 Mo. 326.)

The evidence shows, as a matter of law, that the defendants were in the adverse possession of these premises. (*Warfield vs. Lindell*, 30 Mo., 272; *Ang. on Lim.*, 5 Ed., pp. 429-432, etc.)

II. There can be but three constructions put upon the deed to Gardner, the trustee, viz :

1. That the wife of grantor, Sarah Ann Whitmore, and her children then living (of which plaintiff's wife, Tillie E. was one) took a present vested interest as tenant's share and share alike. 2. That grantor's wife, Sarah Ann Whitmore, took a life estate only, and her children then living, took a present vested remainder : Or, 3. that the wife Sarah Ann took the absolute equitable title (the legal title being in the trustee), and her children took nothing until after her death.

One of the two first constructions must be adopted in order to sustain the plaintiff's claim. If the last construction is the true one, then plaintiff has no title whatever in this land, and the judgment of the lower court is altogether erroneous.

1. It is manifest that it was not the intention of the grantor that his wife and children should take as tenants in common, share and share alike, because the conveyance was to the trus-

tee for the benefit of "my wife Sarah Ann and her children now living, or hereafter born or to be born." And the wife and her trustee were invested with discretionary power to sell or dispose of any property in the deed. This power of disposition is inconsistent with a tenancy in common with the children. 2. For the same reason it cannot be maintained that the deed conveyed a life estate only to the wife, Sarah Ann, and a present vested remainder to the children. The power of disposing of the fee is inconsistent with a mere life estate, and could not exist, if the children held the remainder. The person who takes a vested remainder must be *in esse*. 3. The most reasonable and just construction of the deed, however, is, that the trustee is a married woman's trustee, that the wife took the equitable title, with the absolute power of disposition, and that the children took nothing until her death. The legal title was in the trustee, who was to collect and pay over the proceeds to the wife during her life, and after her death (and not until after her death) the property or whatever was left of it, vested in the children and the trust became executed. (English vs. Beehle, 32 Mo., 186; McDowell vs. Brown, 21 Mo., 57; Hazel vs. Hagan, 47 Mo., 277; Green vs. Sutton, 50 Mo., 186; Major vs. Lisle, 51 Mo., 227; Turner vs. Timberlake, 53 Mo., 371; Emison vs. Whittelsey, 55 Mo., 254, 258.)

A. H. Buckner, for Respondent.

I. The action in partition was maintainable. There was no ouster, or pretense of an ouster. The evidence shows that the tenant for life died Nov. 1871, the property having been leased by the tenant for life for some years, and that the lease did not expire until the year after, when this suit was commenced (February, 1872). The plaintiff had no right of action until after the death of Mrs. Whitmore, and this suit was commenced within six months after her death, and the only evidence of an ouster is that the defendants did not regard the plaintiff as having any interest in the real estate, and appropriated to themselves the rents and profits. There is no

Wommack v. Whitmore, et al.

pretense of ouster or holding adversely, and the action was well brought. (Lambert vs. Blumenthal, 26 Mo., 471; Rozier vs. Johnston, 36 Mo., 326.)

II. The deed to Gardiner, the trustee, conveyed a present vested interest to his wife and children, with a life estate in the wife during her widowhood, and the remainder to his children in fee.

VORIES, Judge, delivered the opinion of the court.

This action was brought in the St. Charles Circuit Court on the 8th day of February, 1872, for the partition of certain real estate situate in St. Charles county, in the petition described. It is charged by the petition that one Benj. F. Whitmore, late of said county, on the 22nd day of December, 1863, was seized and possessed in fee, of certain real estate in said county; that by his deed of that date, he conveyed to the defendant, Ignatius Gardiner, all of certain lands which are described in the petition, the same being a tract of land consisting of several hundred acres together with two lots (102 and 104 in block 10) in St. Charles commons, the same being all of the land owned by the grantor in said county at the date of said deed; that said lands were conveyed to the defendant, Gardiner, for the special use and benefit of the grantor's wife, Sarah Ann Whitmore, and her children, then living, or thereafter to be born. The said Sarah Ann was to have the use and enjoyment of the same during her natural life, or if the grantor should die, the said Sarah Ann surviving him, the said Sarah Ann should only have the use of said lands during her widowhood. The petition further alleged that the said Benjamin F. Whitmore departed this life in the year 186-, his said wife surviving, and that the said Sarah Ann departed this life in the year 1871; that at the time of the execution and delivery of said deed to said Gardiner, there had been born to said Sarah Ann and said Benjamin F. Whitmore, and were then living, the following children, to-wit: Benjamin T. Whitmore, Tillie E. Whitmore, Mary E. Whitmore, since intermarried with the defendant, Dominic

Fletcher, and Missouri Whitmore, who is a minor under the age of eighteen years; that the plaintiff and said Tillie E. were married in the month of September, 1866, and that she departed this life in May, 1868, leaving an only child, Mary Ida Wommack, who survived her mother until the 26th day of February, 1869, at which time she died.

The petition then charges, that by virtue of the marriage of the plaintiff with said Tillie E., the birth of her child, Mary Ida, the death of the said Tillie E., and the subsequent death of the child, Mary Ida, the plaintiff became and is entitled to the interest of the said Tillie E. in said real estate at the time of the execution of said deed before set forth, the same being one undivided fourth part of said lands, and that the defendants, Benjamin T. Whitmore, Mary E. Fletcher, and Missouri Whitmore are each entitled to one undivided fourth part thereof. Partition is prayed in conformity to the rights of the parties, etc.

The parties defendant were served with process, after which a guardian *ad litem* was appointed for the infant defendant.

The defendants answered, denying that the said Benj. F. Whitmore executed a deed to defendant, Gardiner, conveying to him said lands for the uses and upon the trust named in the petition, but averring that by the terms of the deed the lands were conveyed to said Sarah Ann, absolutely, in fee simple, and that her children received no present interest in the same; that both the wife and child of the plaintiff died before the death of the said Sarah Ann, and therefore no interest in the lands ever vested in the plaintiff; that defendant, Gardiner, had no interest in the land, he having conveyed the said lands to said Sarah Ann, in her life-time, by virtue of the powers in the deed to him, by said Benj. F. Whitmore.

The defendants further stated in their answer, that they were, at the commencement of the suit, in the actual possession of the lands named in the petition, holding the same adversely to the plaintiff, and not acknowledging any right in the plaintiff to any part of the premises, wherefore plaintiff had no right to partition, etc.

A replication was filed, putting in issue the affirmative facts stated in the answer.

The case was tried by the court, a jury having been waived by the parties. No question is made in the pleadings, and none was made on the trial, nor is any question made in this court, as to the date of the execution and delivery of the deed from Benj. F. Whitmore to Ignatius Gardiner, nor as to the number and names of the children of Sarah Ann Whitmore, nor as to the time of the marriage of the children, nor of the death of the said Sarah Ann and her daughter, Tillie, nor as to the birth and death of Tillie's child—all of these facts are conceded to be truly stated in the petition. The plaintiff, on the trial, read in evidence the deed from Benj. F. Whitmore to Ignatius Gardiner. This deed conveys the land named in the petition to Gardiner; the substantial parts of the deed being as follows. After acknowledging the consideration of one dollar the deed proceeds: "Hath granted, bargained and sold to the party of the second part, for the special use and benefit of my wife, Sarah Ann, and her children now living or hereafter born, or to be born, the following described real and personal property." (Here follows a description of the lands named in the petition with a large quantity of personal property.) The deed then proceeds: "To have and to hold the above described property to him, the party of the second part, for the special use and benefit of the said Sarah Ann, during her natural life (and in the event of the death of the grantor) so long as the said Sarah Ann shall remain my widow, and after her death, for the special use and benefit of my children now living, or hereafter to be born, and the said party of the second part, at the special instance and request of the said Sarah Ann, may sell or dispose of any or all of the above mentioned property for the use aforesaid, and apply the proceeds thereof for the special use and benefit of the said Sarah Ann and her children; but specially limited to her natural life and widowhood as above specified, the use and benefit of the property aforesaid. To have and to hold the above described

real and personal estate to him, the party of the second part, his heirs and assigns forever, for the special use and benefit of the said Sarah Ann and her children. In testimony," etc.

The plaintiff offered no further evidence. The defendants then read in evidence a deed executed by Ignatius Gardiner to Sarah Ann Whitmore for the lands in controversy, dated the 22nd day of December, 1866. This deed recites the previous deed made by Benj. F. Whitmore to Gardiner, after which, the deed proceeds as follows: "Now, therefore, know all men by these presents, that I, the said Ignatius Gardiner, do, by these presents, at the special instance and request of the said Sarah Ann Whitmore, and for and in consideration of the sum of one dollar to me, in hand, paid by the said Sarah Ann, and for and in consideration of divers other goods and sufficient reasons, grant, bargain and sell, transfer and convey unto the said Sarah Ann Whitmore, all of the above described real and personal property, and all authority, control, possession, right, title and interest in, to and over said property which I might, could or may have or exercise by virtue of the aforementioned deed. To have and to hold, etc."

The bill of exceptions states that the defendant also read a deed in evidence from Mrs. Sarah Ann Whitmore and Ignatius Gardiner, trustee, to Ludwig Schack dated the — day of — conveying to said Schack, lot No. 104, block 10 of the St. Charles common, which it is stated was introduced to show that neither plaintiff or defendants were in possession of said lot. This last named deed does not appear in the record, and no further reference is made to its provisions.

The defendant then introduced evidence tending to prove that Schack had been in possession of lot 104, for four or five years, and that neither plaintiff or defendants had been in possession of said lot for or during said time; that the other portions of the land had been leased by Mrs. Sarah Ann Whitmore during her life-time, and that the defendant, Benj. F. Whitmore, her administrator, had been receiving the rents for the land since his mother's death; that the plaintiff had

Wommack v. Whitmore, et al.

never received any of the rent nor applied for any, and had not been recognized by the administrator or the other children of Mrs. Whitmore as a part owner of the land; that, in fact, nothing had been said by, or between plaintiff and defendants in reference to the land or its possession since the death of Mrs. Whitmore; that a conversation had once taken place between Benj. F. Whitmore and plaintiff before the death of Mrs. Whitmore, in which Benj. Whitmore had told plaintiff that people told him that plaintiff had an interest in the land in question, and that plaintiff replied that if he had, he did not know it, or words to that effect.

The court, after hearing the evidence, rendered a judgment, declaring the rights of the parties in the land to be as claimed in the petition, and appointed three commissioners to partition the same. The commissioners afterwards reported that the lands could not be partitioned in kind, without great damage to the parties in interest, after which the court made an order directing the sale of the land and a partition of the proceeds in conformity to the statute on that subject.

The defendants then, in due time, filed a motion for a rehearing or new trial setting forth the usual grounds for such motions. This motion being heard and overruled by the court, the defendants appealed to this court.

The first ground of objection urged by the defendants in this court to the judgment rendered by the Circuit Court is, that the plaintiff had failed to show any title or interest in himself to the land in controversy; that the deed read in evidence from Benj. F. Whitmore to Ignatius Gardiner, had the effect to convey to, or vest in, the said Sarah Ann Whitmore, the whole title of the land in controversy; that the deed conveyed the use of the land to her with the power of disposition, which had the effect to vest in her the entire estate, and that as Tillie E., who was her daughter, and the child of Tillie E. both died before Sarah Ann, the mother of Tillie, no title or interest in the land ever vested in either plaintiff or his wife.

It is generally true, at least in the construction of wills, that an absolute power of disposition over property conferred by will, and not controlled by any provision or limitation, amounts to an absolute gift of the property; but where a life estate only is expressly given, the rule is otherwise. (*Rubey vs. Barnett*, 12 Mo., 1; *Gregory vs. Cowgill*, 19 Mo., 415, and cases cited.) The deed relied on by the plaintiff in this case conveys the property for the special use and benefit of the grantor's wife and her children, and then in the *habendum* clause, to render the intention more certain, he says, that the land is conveyed to the party of the second part to hold "for the special use and benefit of the said Sarah Ann, during her natural life (and in the event of the death of the grantor) so long as the said Sarah Ann shall remain my widow, and after her death for the special use and benefit of my children now living, or hereafter to be born;" and the power to sell is also limited to the same uses. Although the different clauses of the deed are a little confused, the grantor sometimes calling the children to whom the remainder is given his wife's children, and in other clauses describing them as his children, the object of the conveyance is plain, and the interest of the wife limited to the use and benefits of the property for her natural life or widowhood, the children being invested with a title to the remainder by operation of the conveyance, and not as the representatives of the wife. The court, therefore, properly held that by virtue of the deed the daughter, Tillie, took an interest in the land which descended to her child, and by virtue of our statute, upon the death of the child, the interest of the mother in the land passed to and vested in the plaintiff. It is next insisted by the defendants, that at and before the commencement of the suit, the plaintiff had no possession of the land either constructive or implied; but that the possession was in the defendants and others who held adversely to the plaintiff, and that the plaintiff had no right to bring a suit for partition of the land, until he had first settled his right to an interest therein by an action of ejectment.

It has been repeatedly held by this court, that where one is in the exclusive possession of land, asserting an exclusive title thereto, an action for partition cannot be maintained against him by one out of possession who claims a common title thereto. (*Lambert vs. Blumenthal*, 26 Mo., 471; *Rozier vs. Griffith*, 31 Mo., 171; *Phillips & Shaw vs. Gregoire*, 41 Mo., 407.)

But in such cases the disseizin or an adverse possession amounting to an actual ouster must be shown, in order to prevent the right to an action for partition. (*Shaw vs. Gregoire*, 41 Mo., 407; *Rozier vs. Johnson*, 35 Mo., 326.)

It is not easy in all cases to determine what acts of one joint tenant are sufficient to constitute such an adverse possession as will amount to an ouster of his co-tenant. In the present case, Mrs. Sarah Ann Whitmore had a life estate in the use of the land in controversy, and had a right to the possession thereof, until her death. She had leased the land before her death, the term of the tenant not having expired at her death. She died in the month of November, 1871, and this suit was brought in the month of February, 1872. After the death of the said Sarah Ann, her son, the defendant, Benj. F. Whitmore administered on her estate, collected the rent for the land and paid her debts therewith, and applied portions thereof to the support of the infant daughter. The said administrator states that he never recognized the right of the plaintiff to any part of the land, and that plaintiff, during these three months that elapsed between the death of Mrs. Whitmore and the bringing of the suit had not applied for or received any part of the rent. We do not think that these facts constituted such an adverse holding as will, in law, amount to an ouster. It is not shown that the holding was notoriously adverse, or that the plaintiff was ever notified in any way that the holding was adverse or hostile to his rights or claim to an interest in the land. We give no consequence to the conversation had between Benj. F. Whitmore and the plaintiff, previous to the death of Mrs. Whitmore. The evidence is conflicting as to the purport of

Charles v. St. L. & I. M. R. R. Co.

the conversation, and it was for the court to find the truth in reference to that matter. It is, however insisted, that as to lot 104, block 10, of the land in controversy, the deed made to that lot by Mrs. Whitmore and the trustee, to one Schack, clearly made out an adverse holding as to that lot, and that it was error in the court to include said lot in the partition. It is only necessary to say in reference to that deed, that the deed is not copied into the record, so that we can see its language or legal effect. It may be that the deed and the possession of Schack thereunder are perfectly consistent with the rights claimed by the plaintiff in the land in controversy. The deed may, for all that appears in the record, only convey and purport to convey to Schack the life estate of Mrs. Whitmore, in which case the possession of Schack under the deed would be consistent with the title claimed by the plaintiff. We are not authorized to assume that the court improperly decided this question. And moreover, in this case, the land is all ordered to be sold and the proceeds divided amongst the parties. Schack not being a party to the record, his interest cannot be affected by the judgment of the court and we cannot see how the rights of the defendants could be injuriously affected. (Forder vs. Davis, 38 Mo., 107.)

We see no error in the record in this case that would authorize a reversal of the judgment. The judgment is therefore affirmed; the other judges concur.

—o—

CATHARINE CHARLES and THOMAS A. CHARLES, Respondents, vs. ST. LOUIS AND IRON MOUNTAIN RAILROAD Co., Appellant.

1. *Practice, civil—Witnesses—Married woman.*—The marriage of a plaintiff, pending her suit, will not render a woman incompetent as a witness.
2. *Practice, civil—Evidence—Reversal.*—Judgment will not be reversed for an error as to evidence, which works no prejudice.
3. *Damages—Measure of, for taking wood.*—Proper measure of damages for the taking of cord wood held to be the value of the wood with six per cent. interest from time of taking.

Charles v. St. L. & I. M. R. R. Co.

*Appeal from Washington Circuit Court.**Dryden & Dryden with J. J. Williams, for Appellant.*

I. The court erred in admitting Mrs. Charles to testify as a witness for the plaintiffs. She was incompetent. She was not the real party in interest. (Cord on Leg. and Eq. Rights of Married Women, §§ 987, 997, 998.) The case in 54 Mo., 285, was under statute giving the wife the right of action; that in 44 Mo., 441, was for land of wife; that in 48 Mo., 291, was to contest the validity of the will of the wife's ancestor.

II. The court erred in refusing to give the 6th instruction asked by the defendant. Both claimed the wood, and both requested the defendant to take it. The taking was not therefore wrongful, and hence was no trespass, and the plaintiffs were not entitled to recover in this form of action. (2 Greenl. Ev., § 613.)

John L. Thomas, for Respondents.

I. The court committed no error in permitting Mrs. Charles to testify in her own behalf. The suit was originally commenced in her name alone, and the cause of action accrued to her in her own right, and continued in her, and still continues in her. (Owen vs. Brockschmidt, 54 Mo., 285; Tingley vs. Cowgill, 48 Mo., 291; Fugate vs. Pierce, 49 Mo., 441.)

II. The value of the timber when taken, with 6 per cent. interest per annum, was the proper measure of damages in this case, and the instructions of the court on that proposition were correct. (Rice vs. Hollenbeck, 19 Barb., 664; 7 Cow., 95; 5 Johns., 348; 10 Johns., 237; 8 Wend., 508; 3 N. Y., 379; 6 Johns., 168; Martin vs. Porter, 5 Mees. & Wels., 351; 9 *Id.*, 672.)

III. The court committed no error in refusing the instruction asked for by defendant in regard to the form of action. Defendant admits in its answer, that it took up the wood as Crawford's—denying the right of Mrs. West to it—and that he

paid Crawford for it. This, in law, amounted to a wrongful taking and conversion of the property. (Sparks vs. Purdy, 11 Mo., 221; O'Donoghue vs. Corby, 22 Mo., 393; Huxley vs. Hartzell, 44 Mo., 370; Koch vs. Branch, 44 Mo., 542.)

WAGNER, Judge, delivered the opinion of the court.

This was an action brought by the plaintiff, Catharine West, who afterwards, and during the pendency of the suit, intermarried with Thomas A. Charles, against the defendant for the taking and conversion of one hundred and fifty cords of wood.

The defendant in its answer admitted that it took the wood sued for, but justified the taking and subsequent conversion. It averred, that one Crawford contracted with the plaintiff, Mrs. West, to cut timber on her land, for cord wood, stave timber and cross ties, and that under that contract he cut the wood in controversy, and that after he cut and hauled the most of it to the railroad, plaintiff, West, sued out a writ of replevin, and that she got possession of the wood through the sheriff, and after the cause had remained in court some time, she dismissed the suit, and turned over the wood to Crawford, who sold the same to defendant; that defendant bought the wood ignorant of the rights of Mrs. West, and in good faith. It is further alleged that Crawford paid for chopping and hauling the wood, and that he had paid Mrs. West all that was due her for the timber taken according to the contract.

A replication was filed, denying that there was any such contract to cut timber, as was alleged in the answer; that Mrs. West got possession of the wood through the replevin suit; that the suit was compromised by the parties, for the purpose of having the matters in dispute submitted to arbitration; that no order of re-delivery was made by the court, and that Mrs. West did not deliver the wood to Crawford, but that after the dismissal of the suit the defendant, in order to aid Crawford, and with a full knowledge of all the facts, bought the wood of Crawford, and paid him for it, and

Charles v. St. L. & I. M. R. R. Co.

denied the right of Mrs. West to it. There was a further averment that Mrs. West hauled the wood to the railroad, and paid for the same.

Evidence was introduced on both sides tending to prove the respective issues. There was a verdict for plaintiff.

During the trial Mrs. West was admitted to testify, after her intermarriage with Charles, and she was objected to as being incompetent. The objection was overruled. We see no error in this decision of the court. The suit was instituted in her name, she continued a party to the record, and therefore was a competent witness.

In the course of the cross-examination the defendant's counsel asked her if she desired to recover the whole value of the wood, which the defendant was charged with taking, without making any allowance for cutting and hauling done by Crawford, and she answered that she thought she ought to recover the full value of the wood. Immediately upon this answer being given, plaintiff's counsel propounded this question: "If you should get all you have sued for, would it pay you for all the damage Crawford has done your land, in cutting the timber on it." Defendant at the time objected to the question, but the court permitted the witness to answer it, when she said that it would not. The question was certainly illegal. It is insisted, however, that as defendant's question, immediately preceding, to the witness as to whether she desired to recover the full value of the wood, without regard to Crawford's cutting and hauling the same, was also illegal, that thereon plaintiff had the right to ask the last question objected to. Both questions were improper and should have been excluded, and because an illegal or improper question is asked and answered, it will not justify another that is equally obnoxious or objectionable. But the questions, though evidently outside of any issue embraced within the case, did no harm. The court correctly instructed the jury as to the damages, telling them that the proper measure was the value of the wood with six per cent. interest thereon, and the verdict was based on that estimate, so the judgment ought not to be reversed for the error in the evidence.

Charles v. St. L. & I. M. R. R. Co.

There is nothing in the objection raised by the defendant to allowing Thomas Charles to testify to a conversation between himself and Billings, the agent of the defendant, and Crawford, in regard to the ownership of the wood. The witness says, that he saw Crawford and Billings a day or two after the replevin suit was dismissed, and asked Crawford if he had a voucher for the wood, and he told witness that he had nothing to say to him about it. He then asked Billings if he had issued a voucher, and he said that he did not know. We fail to see any declaration here on the part of Billings prejudicial to the defendant.

For the plaintiff the court instructed the jury in substance, that if they believed from the evidence, that Crawford cut the wood off from the land belonging to Mrs. West, without authority from her and against her consent; that said wood was taken from the possession of Crawford and delivered to Mrs. West, by virtue of a writ of replevin, and the wood was not re-delivered to Crawford, and the defendant took the same and paid Crawford therefor, and denied the title of Mrs. West, then they should find for the plaintiffs, and assess the damages of the wood taken, with six per cent. interest per annum; that if they should further find from the evidence, that Crawford cut the wood in controversy without any authority from Mrs. West and against her consent, then Crawford acquired no title to the wood; and if they further believed from the evidence, that defendant, by its agent, received the property from Crawford and paid him for it, knowing that Mrs. West claimed to be the owner thereof, then the verdict should be for the plaintiffs; that if from the evidence the jury believed the wood in controversy belonged to Mrs. West, and the defendant took and carried it away without her consent, they should find for plaintiffs.

The court gave four instructions for the defendant. The first told the jury, that, although they might believe from the evidence that the wood in controversy was not included in the contract between Mrs. West and Crawford, yet if they believed that Crawford cut the wood and had the same, or a

portion of it, hauled and delivered at his expense, acting in good faith, and supposing that the contract covered the wood, and Mrs. West afterwards accepted and received pay in full satisfaction for the wood, according to the terms of the contract, with a knowledge of the facts, then the verdict should be for the defendant. By the second instruction the jury were told, that if they believed from the evidence, that Crawford and Mrs. West made a contract by which he was to cut a quantity of wood on her land, at his own expense, and sell it and divide the net proceeds of the sale with her, equally, and the wood that was taken by defendant was cut by Crawford under the contract, and before defendant had taken the wood, Mrs. West had received her share of the proceeds, then the plaintiff was not entitled to recover.

The third instruction was to the effect, that if the jury believed from the evidence, that Mrs. West had been fully paid by Crawford for the wood that defendant took, and that she received such payment with a knowledge of the facts, then the plaintiffs were not entitled to recover; and the fourth declaration instructed the jury, that if Mrs. West made a contract with Crawford, by which he was to cut a quantity of wood on her land, paying her half the proceeds therefor, and if in pursuance of that contract he cut the wood in question, which defendants took, the plaintiffs were not entitled to recover, and the verdict should be for the defendant.

The fifth instruction, which was refused, is not relied on here by the defendants, but it is urged that the court erred in refusing to grant the sixth. That declared, that if the jury should believe from the evidence, that the wood taken by the defendant was placed near the track, partly by Crawford and partly by Mrs. West, and that each of them claimed the wood, and requested the agent of the defendant to measure and take it, and that the agent, having been so requested, measured the wood for defendant, then it was not material whether the title was in Crawford or Mrs. West, the defendant could not be held liable in this action.

Peters v. Linenschmidt.

The instruction was rightly refused. If the title was in Mrs. West, the defendant had no right to take the property and pay Crawford for it. The instructions given on both sides present the law with fairness, and are sufficiently favorable to the defendant.

The case principally turns on questions of fact, and with them we have nothing to do. The jury have found the facts by their verdict, and we cannot interfere. The judgment, with the concurrence of the other judges, must be affirmed.

O

WILLIAM PETERS, Respondent, *vs.* HERMAN LINENSCHMIDT,
Appellant.

PER CURIAM.

1. *Bills and Notes—Sureties—Notice to holder to sue principal—Due diligence—Rights of surety.*—Under the statute concerning sureties and their discharge (Wagn. Stat., 1302 *et seq.*) the creditor who has been notified, as provided in section 1, must do two things; first, he must commence suit against the principal debtor within thirty days; second, he must prosecute his suit with due diligence, in the ordinary course of law, to judgment and execution, or else the surety, who may be joined in the action with his principal, will be discharged. Due diligence in the prosecution of the suit is just as essential as commencement within the time limited, in order to fix the liability of the surety after such notice. If the creditor brings such suit and fails to obtain service on the principal at the first term, he should take out an *alias* summons to the next term, and then under Wagn. Stat., (1010, § 20,) he would be entitled to judgment against the surety in case service was not had on the principal, unless the surety should consent to further delay.

PER NAPTON, JUDGE, DISSENTING.

1. *Bills and Notes—Surety, action against.*—The creditor, under the statute, has a right to sue both principal and surety; and when the summons against the principal is returned *non est*, he has a right to dismiss, as to the principal, and proceed against the surety alone.

Appeal from Warren Circuit Court.

P. P. Stewart, for Appellant, cited *Christy's Adm'r vs. Horne*, 24 Mo., 242; *Perry vs. Barrett*, 18 Mo., 140; *Routon's Adm'r vs. Lacy*, 17 Mo., 399; *Hickman vs. Hollingsworth*, 17 Mo., 475; *Phillips vs. Riley*, 27 Mo., 386.

L. J. Dryden, for Respondent.

I. Plaintiff used due diligence in the prosecution of his suit against New. No extraordinary proceeding is necessary in the prosecution of such suits; only such as in the language of the statute (2 Wagn. Stat., 1303, § 2) is "in the ordinary course of law." (*Hughes vs. Gordon*, 7 Mo., 297; *Perry vs. Barrett*, 18 Mo., 147; *Phillips vs. Riley*, 27 Mo., 387.) The failure of the sheriff of St. Louis county to serve New, ought not to be held to be any want of due diligence on the part of the plaintiff. Negligence of officers, employed by the law to do those acts which they alone can do, is not to be attributed to a party who is obliged to entrust process to them. (*Jacobs vs. McDonald*, 8 Mo., 568.)

II. Plaintiff having been guilty of no want of diligence in the prosecution of the suit against New, up to the time it was reached for trial on the issues made by the separate answer of Linenschmidt, had the right, then, to dismiss as to New, and take judgment as to Linenschmidt alone. Our statute allows but one final judgment in every case. (2 Wagn. Stat., p. 1053, § 8; *Hutchins vs. Sims*, 7 *Humph.* 236; *Dow vs. Rattle*, 12 *Ill.*, 373; *Dennison vs. Lewis*, 6 *How. [Miss.]*, 517.) In order to get one final judgment in the case and have Linenschmidt included in that judgment, he was bound either to dismiss then, as to New, and take final judgment against L. only, or to continue and bring New in by *alias*, and get one judgment as to both. The latter course would not be the ordinary course, and would have imperiled his opportunity of making his debt. The course which plaintiff pursued was the "ordinary course" and therefore the right course.

SHERWOOD, Judge, delivered the opinion of the court.

Jacob New was the principal, and the defendant Linenschmidt was the surety, in a certain promissory note for the sum of \$357, which they had given to the plaintiff. Upon maturity of the note, Linenschmidt, who lived in Warren

county, served notice on the plaintiff, who resided in the same county, to bring suit on the instrument. This demand was complied with in due time, service had on defendant, and a writ sent by mail to St. Louis county, with the view to service on New, who lived in that county; but no return was made to this writ. At the return term, when the cause was called for trial, the plaintiff dismissed his suit as to New, against the objections of the defendant, and took judgment as to him. Under the old practice, courts of equity, proceeding in analogy to certain writs of the common law, denominated by Coke *Brevia Anticipantia* or writs of prevention, (Co. Litt., 100 a.) were accustomed to grant relief to a surety on his application for that purpose, by bill *quia timet*, in two different ways: First, by allowing him to proceed against both creditor and debtor to compel the latter to pay the debt. Or, second, the surety might proceed against the creditor alone and compel him to bring his action. (King vs. Baldwin, 2 Johns. Ch., 554, and cases cited; Sto. Eq. Jur., §§ 327, 638, 849; Milf. Eq. Pl. by Jeremy, 148.) And our statute (2 Wagn. Stat., ch. 132, p. 1302,) which allows notice to be given to the creditor, is no doubt only substitutionary, although it may not be exclusively so, of the ancient chancery practice, by which the exoneration of the surety was formerly accomplished. And the direct method pointed out by the statute, is certainly infinitely preferable to the circuitous one I have mentioned.

Section two of the statute to which allusion has been made provides: "If such suit is not commenced within thirty days, after the service of such notice, and proceeded in with due diligence, in the ordinary course of law, to judgment and execution, such surety shall be exonerated from liability to the person so notified."

It will be at once perceived from a perusal of the above section, that the creditor who has been notified, must do two things: First, he is to commence his suit within thirty days and second, that suit must be proceeded in with due diligence, in the ordinary course of law, to judgment and execu-

tion, or else the notifying surety who, under the provisions of section one of the same chapter, may be joined in the action with the principal debtor, will be released from further responsibility.

The law is just as imperative that the suit against the principal debtor should be pressed to its final consummation, and that too with diligence, as it is that it shall be commenced within the time limited. So soon as the surety gives notice, his former absolute and unconditional liability becomes merely a conditional one, subject to be entirely defeated by non-compliance with the statutory mandate in both the particulars referred to; and subject also, in consequence of compliance, to be re-converted into its former unqualified state. In other words, the attitude of the surety, after notice, is precisely the same as that of an indorser before notice, and nothing short of the prompt commencement, as well as the diligent prosecution, of the suit against the principal debtor to the uttermost extremity known to the ordinary course of law, can "fix" the surety, or transform his conditional, into an absolute engagement. *Perry vs. Barrett*, (18 Mo., 140) although not fully in point, sustains this view.

Under the above detailed circumstances, the plaintiff, having failed to obtain service on New at the first term, should have taken an *alias*, returnable to the second term, and then, according to the provisions of 2 Wagn. Stat., (§ 20, p. 1010,) if service were not had on New, the plaintiff would have been entitled to judgment against defendant, unless upon consent of the latter to further delay. And the issuance of an *alias* writ is as much in the ordinary course of law as the suing out of the original.

Our statute respecting sureties, as to the means it provides for their exoneration, is so plain and positive, that it must be either faithfully obeyed, or else practically obliterated. No hesitancy will be therefore felt in pursuing the former course.

Judgment reversed and cause dismissed. Judge Lewis not sitting; the other judges concur, except judge Napton, who dissents.

Harrington, et al. v. Fortner, et al.

NAPTON, Judge, delivered the dissenting opinion.

I do not concur in this opinion. As the creditor had a right under the statute to sue both principal and surety, and did so, and the process against the principal was returned "*non est*," the plaintiff had a right to dismiss as to the one not served, and take his judgment against the defendant served. He had prosecuted with due diligence and according to law. He might have continued until the next term, if he desired a judgment against the party not served, but he was not obliged to do so. Before the next term the surety might fail, and thus he would lose his debt.

FRANCIS M. HARRINGTON, *et al.*, Respondents, *vs.* THOMAS FORTNER, *et al.*, Appellants.

1. *Practice, civil—Justices' judgments—Return nulla bona—Execution from office of clerk of court.*—If, in a suit before a justice of the peace, a party to the suit becomes a non-resident of the county before judgment is rendered against him, it is not necessary to issue an execution against him and have it returned *nulla bona*, prior to the issue of an execution from the office of the clerk of the court in which the transcript is filed.
2. *Justices of the peace, proceedings of—Titles—Judicial sales.*—Proceedings before justices of the peace should never be viewed with technical nor hypercritical nicety, especially when they are made the bases of titles arising from judicial sales.
3. *Conveyances—Acknowledgments—Validity—Constructive notice.*—A deed good at common law is operative as to the parties thereto and those having actual notice thereof, although the acknowledgment of it may be worthless. The object of an acknowledgment is, that the deed may be admitted to record, and thus impart constructive notice to all persons of its contents.—(*Caldwell vs. Head*, 17 Mo., 561.)
4. *Conveyances, how proved—Depositions—Formalities for record.*—A conveyance of land may be proved by the deposition of the grantor, with a copy of the conveyance annexed. The provisions of the statute concerning the requisite formalities to be observed before a deed can be recorded, are applicable alone in cases where a registration of the deed is desired, and do not prevent the establishment of the execution of the deed by other modes of proof.
5. *Mortgages—Seals, lack of—Acknowledgment—Record.*—A mortgage, though lacking a seal, is still good as an equitable mortgage, and if acknowledged and recorded imparts notice with equal efficiency as if sealed.—(*McClurg vs. Phillips*, 57 Mo., 214.)

6. *Ejectment—Equitable defenses—Mortgage, default on.*—In an action of ejectment the allegations of a default on the mortgage debt on said land is an equitable defense in favor of the mortgagee, or any one else in possession of the premises claiming under him, and, until satisfied, is a bar to the action. (*Hubble vs. Vaughn*, 42 Mo., 138.)

Appeal from Adair Circuit Court.

DeFrance & Halliburton, for Appellants.

I. The plaintiffs have not the legal title. The judgment before the justice of Macon county was void. The admission of parol evidence, to show that the summons was returned by the deputy in the name of his principal, was error. The evidence shows that the return was made by the deputy in his own name, and so absolutely void. (1 Mo., 504; 5 Mo., 533; 7 Mo., 359; 8 Mo., 177; *Samuels vs. Shelton*, 48 Mo., 444; *McClure vs. Wells*, 46 Mo., 311.)

II. The deed from Glassburner to Oliver did not pass the legal title. (Wagn. Stat., 273, § 7.) The case of *Caldwell vs. Head* was based on the statute of 1845, which is materially different from the statute of 1865. Said conveyance passed nothing more than an equitable interest, and did not convey a title upon which ejectment could be sustained.

III. A deed cannot be proven by a deposition to the copy of the record of it. The statute prescribes the manner of proving a deed, and it cannot be proven any other way. (Wagn. Stat., 275-6, §§ 11, 15, 17, 18, 19, 20, 21.)

IV. Plaintiffs have no right to recover without paying defendant the amount of the note and interest secured by the mortgage from Oliver to Johnson, for buying at sheriff's sale they buy no more than Oliver had, and the rule of *caveat emptor* applies. (10 Mo., 157.) Again, a party, buying land of which another is in possession, takes it with notice of the possessor's rights. (7 Mo., 610; 4 Mo., 62; 11 Mo., 77; 21 Mo., 313; 22 Mo., 415; 25 Mo., 318; 39 Mo., 506; 40 Mo., 405; 47 Mo., 306; 49 Mo., 350.) And the record of any instrument affecting real estate, which is properly acknowledged, whether it is sealed or not, is full notice to every one

of its contents. (Wagn. Stat., 277, §§ 24, 25.) The mortgage, unsealed as it is, is good between Oliver and defendants, and the plaintiffs have no better position than Oliver had. (10 Mo., 229; 12 Mo., 63; 38 Mo., 120; 39 Mo., 24; 46 Mo., 404, 472.) Defendants in ejectment have a right to use all equitable defenses. (Pemberton vs. Johnson, 47 Mo., 227.)

V. Defendants can also show an outstanding legal title to defeat plaintiffs' suit. (6 Mo., 330; 11 Mo., 149; 17 Mo., 98; 27 Mo., 286, 405.) The defendants show an outstanding legal title in Halliburton, who, although he bought with knowledge of the record of the conveyance from Glassburner to Oliver, yet bought the legal title, as the deed from Glassburner to Oliver only conveyed an equitable title, and the deed not being acknowledged, was no notice to any of its contents, although they had seen it. And another rule of law comes in here, and that is this: "Equity extends its protection equally, if the purchase is originally of an equitable title without notice, and afterwards the party obtains or buys in a prior legal title, in order to support his equitable title." (1 Sto. Eq. Jur., 9 ed., 56, § 64, n. 3.) In this case Johnson had the equitable title, and Halliburton bought in from him a prior legal title to support his equitable title.

VI. Defendants can dispute Oliver's title, though he is Johnson's vendor. (9 Mo., 177; 12 Mo., 238; 11 Mo., 116; 16 Mo., 273; 33 Mo., 269; 36 Mo., 163.)

VII. The plaintiffs must recover upon their own legal title or fail. (Wagn. Stat., 557, § 1; Beal vs. Harmon, 38 Mo., 435.)

VIII. As to equitable defenses in ejectment suits, see Jones vs. Mack, 53 Mo., 407; Honaker vs. Shough, 55 Mo., 472.

Harrington & Cover, for Respondents.

I. The mortgage was but an equitable one, and required the interposition of a court of equity to enforce the same.

II. All the interest that Johnson can claim to said land he got by virtue of the equitable mortgage. When a dismissal

Harrington, et al. v. Fortner, et al.

was entered as to Johnson, he went out of court, and then his defense under his mortgage ceased. If it be true that Oliver had no interest in said land at that date, on account of the defective acknowledgment as claimed by appellants, then it is equally true that Johnson has no interest.

III. The evidence shows that Oliver left the State only a few days after the service of process on him, and it was not necessary to have an execution issued by the justice. (Wagn. Stat., 839, § 14.)

IV. When an instrument is lost or destroyed, parol evidence is admissible to prove its contents. (Gould vs. Trowbridge, 32 Mo., 291; Farrell's Adm'r vs. Brennan's Adm'r, 32 Mo., 392; Broggs vs. Henderson, 49 Mo., 531; Minor vs. Tillotson, 7 Pet., 99; Christy vs. Kavanaugh, 45 Mo., 375.)

V. The instrument, introduced in evidence, from Oliver to Johnson was not made under seal, and imparted notice to none. It was not such an instrument as the law authorized to be recorded; it was only an equitable mortgage.

VI. There is no evidence to show that Harrington had notice of the so called mortgage and knew that Fortner was in possession of said land. The execution of the deed from Glassburner to Oliver can be proven by a deposition of a witness. The proof in question was taken by a notary public in California. (Wagn. Stat., 274, § 9.)

SHERWOOD, Judge, delivered the opinion of the court.

The plaintiffs, Harrington and Cover, brought the present action to recover possession of the south east quarter of section 22, township 62, of range 17, and the south west quarter of section 23, of the same township and range. Both parties claim title through the same common source, John Oliver, who entered the land, conveyed it to Glassburner, who, in 1859, not having paid the purchase money, re-conveyed the land to Oliver; but the deed to the latter, although duly recorded, was defectively acknowledged, by reason of the acknowledgment having been taken before a justice of the peace in Iowa.

Harrington, et al. v. Fortner, et al.

The title of the plaintiffs is derived through a sale under an execution issued from the Circuit Court of Macon county, upon the transcript of a judgment rendered by a justice of the peace of that county, in favor of Workman and against John Oliver, in the year 1869. This execution was directed to the sheriff of the county where the land was situated; the sale thereunder took place on the 27th of October, 1870, and was consummated by the deed of the sheriff, bearing date the 31st of that month.

The defendants pleaded the general issue, also that the transcript was filed in, and the execution issued out of, the office of the clerk of the Circuit Court, without authority of law; that the judgment against Oliver was rendered without notice; and further, as an equitable defense, they set forth, that Oliver, on the 31st of July, 1867, in order to secure the payment to Johnson of a note for \$200, executed to him a mortgage on the premises in controversy, with power of sale in case of default made in the payment of the sum thus secured; that this mortgage was duly acknowledged and recorded, and was perfect in all its parts, except that it failed to have a scrawl attached by way of a seal; that Oliver failed to pay the note at maturity, and Johnson, exercising the powers vested in him by the instrument, sold the premises to defendant Fortner, who thereupon, in good faith, took possession of the premises, made valuable and lasting improvements, paid the tax thereon, and was in possession at the time of plaintiff's alleged purchase.

The chief averments of the answer were denied in the reply.

At the trial it appeared in evidence, that the original papers in the cause of Workman vs. Oliver were lost; parol evidence was therefore admissible to show that the summons had been duly served by the deputy constable, Jones, in the name of his principal, Lester. And the memorandum on the docket of the justice, that the summons was served on Oliver by the deputy, Jones, does not by any means contradict the parol evidence that such process was served in the name of

the proper officer. As the evidence tended very strongly to show that Oliver became a non-resident of the county before judgment was rendered against him, it was unnecessary for the justice to issue an execution, and that the same should be returned *nulla bona*, prior to the issuance of an execution from the office of the clerk, in which the justice's transcript was filed. (Wagn. Stat., 839, § 14.) And no doubt the court below took this view, and regarded Oliver, upon the evidence adduced, as a non-resident of the county. But even were there no parol evidence on this point, by the return on the execution it sufficiently appears, not only that Oliver had no goods or chattels in the township whereon to levy, but that he had become the resident of another State. And this return, although informally drawn, is evidently intended to be in the name of the principal constable, Lester, as the name of the latter is mentioned as constable, and Jones as his deputy, but a few lines above the signature of the deputy, as apparently copied by the justice on his docket.

The objections made to the deed of the sheriff to plaintiffs are therefore regarded as untenable. Proceedings before justices of the peace should never be viewed with technical or hypercritical nicety, and this is especially the case when such proceedings are made the bases of titles arising from judicial sales. The objections to the deed from Glassburner to Oliver, and the method adopted by plaintiffs to establish its authenticity, are also without merit. Both parties claimed under Oliver, and the instrument of writing executed between Johnson and Fortner explicitly recognizes his right, or that of those claiming under him, to redeem the land mortgaged.

The deed from Glassburner to Oliver, although the acknowledgment was worthless, was good as a common law deed, and was, having been duly delivered, as valid and operative to all intents and purposes between the parties thereto, and those having "actual notice thereof," as though acknowledged with every statutory formality. (Wagn. Stat., 277, § 26; Caldwell vs. Head, 17 Mo., 561.)

The chief object of having a deed acknowledged is, that it may be admitted to record, and thus impart constructive notice "to all persons of the contents thereof." But where actual notice exists, as is plainly the case here, all necessity for the constructive notice, which under our registry act is only imparted upon the due acknowledgment and filing for record of the deed, vanishes away. In addition to this, it was perfectly competent to establish by the testimony of Glassburner, as contained in his deposition, that he had conveyed the land to Oliver by a deed, a copy of which was annexed to that deposition. And this method is not obnoxious to the charge of not being in conformity to the provisions of the statute concerning the requisite formalities to be observed before a deed can be recorded. Those provisions are obviously applicable alone in cases where registration of a deed is desired; and do not in the least tend to prevent the fact of the deed having been executed, from being established by other modes of proof equally satisfactory. The mortgage executed to Johnson by Oliver, although lacking a seal, was still possessed of validity as an equitable mortgage, and having been duly acknowledged and recorded, imparted notice with equal efficiency as if sealed.

This point was thus expressly ruled in the case of McClurg vs. Phillips, (57 Mo., 214). Default having been made in the payment of the mortgage debt; this fact would constitute when pleaded, as it was in defendant's answer, an equitable defense to the plaintiff's action on the part of the mortgagee, or any one else in possession of the mortgaged premises, claiming under him. This was so held in the case of Hubble vs. Vaughn, (42 Mo., 138). And though the mortgage was in that case sealed, the two cases are not distinguishable in point of principle.

It is unnecessary to determine the precise force and effect of the contract between Johnson and Fortner. It is sufficient to say, that it had at least the effect to transfer to the latter whatever of possessory right the former had to the mortgaged premises, and being in possession of those premi-

Ownby v. Ely.

ses under a contract with Johnson, he was in as advantageous position as Johnson himself would have been under like circumstances. The result, then, at which we have arrived, is, that the mortgage, although merely an equitable one, having been specially pleaded as an equitable defense, constitutes, until satisfied, a complete bar to plaintiff's action.

For these reasons the judgment is reversed and the cause remanded. Judge Wagner absent; the other judges concur.

—o—

JOHN W. OWNBY, Appellant, vs. DAVID A. ELY, Respondent.

1. *Assignments—Inventories—Conveyances—Trusts.*—Where A., as assignee, took possession of an interest in property which had passed to him by the assignment, and without having the property inventoried and appraised, or procuring an order of court for its sale, sold the same for \$100, and then, in two or three days thereafter, re-purchased it from his vendee by quit-claim, for the expressed consideration of \$400, and then procured the whole title from the person who owned the other interest, claiming it all as his own, and did not account for the proceeds of the sale on his settlement; *Held*, that the transaction was fraudulent, *per se*, and that the assignee would be declared a trustee for the assignor or whoever was entitled to his interest.
2. *Interest.*—Six per cent. interest only can be allowed, except where a different rate is contracted for between the parties or fixed by the statute.

Appeal from Macon Circuit Court.

Harrington & Cover, with D. S. Hooper, for Appellant.

I. It was the duty of Ely to file an inventory of the property under oath, which came into his hands. (W. S., 151-2, §§ 2, 3.)

II. The ruling of the court below makes Ownby pay what Ely loses by his fraudulent acts. (Allen vs. Berry, 50 Mo., 90.)

Ellison & Ellison, for Respondent.

WAGNER, Judge, delivered the opinion of the court

This was a proceeding in the nature of a bill in equity, the object of which was to declare a trust upon certain real estate, and have the defendant held as a trustee for the plaintiff.

The petition alleged that in 1866 plaintiff and one Lee purchased of I. B. Dodson the land in question, and paid for the same, and that Dodson executed and delivered to them a warranty deed therefor; that in 1867, plaintiff having been sheriff and collector of Adair County, became defaulter to the county and State, and, desiring to secure the indebted-

ness, he made a voluntary assignment to the defendant of all his property both real and personal, including his interest in the land in controversy; that defendant accepted the trust, but, through fraud, designedly failed and neglected to have the property inventoried and appraised as required by law; that in furtherance of this fraud, on the 27th day of June, 1868, he made a pretended sale of plaintiff's interest in the land, without having it inventoried or appraised, and without obtaining an order of court authorizing him so to do, to one Brown, for the sum of one hundred dollars, when the property, at the time, was worth two thousand dollars; that he executed to Brown a deed for the land, and in two days thereafter received a quit-claim deed from Brown to himself for the said land for the consideration of four hundred dollars; that at the same time defendant and Dodson were colluding and confederating together to obtain from Lee the deed Dodson had made and delivered to plaintiff and Lee, which deed had never been put upon record, and, after the same was secured, they refused to deliver it to the plaintiff, and that the defendant agreed to pay Dodson one-half of the value of the land, if he would make him a warranty deed to all the land, which Dodson did, accordingly, on the same day that Brown made his deed to the defendant, and that defendant recorded both of the deeds and claimed the land as his own; that afterwards, at the May Term, 1869, of the Adair County Circuit Court, defendant, as assignee of the plaintiff, made a final settlement, and was discharged by the court, without accounting for the property, and that he refuses to convey the same to the plaintiff. The answer denied all the allegations stated in the bill, and averred that defendant bought the property in good faith, and that he applied the proceeds to the benefit of plaintiff's creditors.

These averments were denied in a replication.

From the record introduced in the matters of the proceedings in the assignment, it appears, that the defendant did not inventory or appraise the property, nor did he procure an order of court directing it to be sold. Although the statute re-

quires all these things to be done, (Wagn. Stat., 151-2, §§ 2, 3; *Id.*, 156, § 34.) yet their omission by the assignee could not destroy the rights of the creditors under the assignment. The power to sell and convey without an order of court might not exist, but that would not affect the trust upon the property, if the question was raised by the creditors or those who were lawfully entitled thereto. But there are no creditors here either presenting or contesting any claim.

The evidence in the case shows, that Lee purchased the land, in conjunction with the plaintiff, from Dodson for the sum of six hundred dollars, and received a general warranty deed therefor. The interest of Lee was one-half, and of the plaintiff the other half. Lee kept the deed in his possession about one year, and never put it on record; he then sold his interest back to Dodson, and delivered to him the deed he had received to himself and plaintiff, instead of making to him a conveyance for his half.

The facts clearly show that plaintiff paid all the consideration money but about fifty dollars (forty-nine is the sum found by the court), and this balance was afterwards paid by the defendant. The testimony of Dodson is explicit, that, in the sale of the land to defendant, although he made him a general warranty deed to the whole, yet he did not pretend to own more than one-half, and had no claims on the interest of the plaintiff. The facts of the sale, as stated in the petition, by defendant to Brown, and a re-sale and conveyance back by Brown to defendant, were clearly proved and are undisputed. There is a conflict in the testimony in reference to plaintiff's declarations concerning the land; Dodson testifies that, when he bought back Lee's interest, plaintiff agreed that the deed might be cancelled, and that he would have nothing more to do with it, that he wanted the defendant to take whatever interest he had and apply it for the benefit of his creditors. Defendant swears that plaintiff told him the title was in Dodson, and that he would have nothing more to do with it. But this testimony is directly contradicted by witnesses on the other side, and, to say the least, is unsatisfactory. The

uncontradicted facts are, that, at the original purchase by Lee from Dodson, all the purchase money, six hundred dollars, was paid by Lee. Plaintiff then paid Lee two hundred and fifty dollars on his half, leaving a balance of fifty dollars unpaid, which was due, not to Dodson, but to Lee. It would be a little strange and quite incomprehensible to see how the plaintiff would agree to an entire cancellation of the deed and an utter destruction of his interest, when he had paid the greater proportion of the consideration.

It is evident, that the defendant recognized the plaintiff's claim when he paid the remaining fifty dollars to quiet the title. Moreover, he sold the property as the plaintiff's property, and that was the only authority he had for selling at all. The settlement made by defendant, as assignee, shows that he did not account for the money proceeding from the sale of the land to Brown, nor in anywise mention it.

Although no bad faith may be directly proved against the defendant in the matter of the sale and purchase of the land, still public policy will not uphold such a transaction. He was acting in a fiduciary capacity. A trust was devolved on him requiring fair dealing with the plaintiff on one side and the creditors on the other. The property was sold by him for one hundred dollars, when the proofs show that plaintiff's interest was worth from seven hundred and fifty to one thousand dollars, and immediately thereafter, defendant buys it back for four hundred dollars, and then goes to Dodson, the original source of title, and procures a general warranty deed for the whole tract, when Dodson knew that he was conveying what did not belong to him. To permit such a course of procedure to prevail, would be giving unlimited license to fraud. Not that every such case would necessarily be fraudulent, but it would furnish an inducement and temptation, which the wisest policy is to utterly prohibit.

The decree cannot be sustained upon any principle. It adjudges that plaintiff shall pay to the defendant the sum of four hundred dollars, which was, by defendant, paid to Brown when he purchased the land, together with ten per cent. in-

Ownby v. Ely.

terest thereon from the date of the purchase till paid ; also that plaintiff shall pay to defendant the sum of forty-nine dollars, amount of payment of purchase to Lee, with ten per cent. interest, all of which sums are to be paid within ninety days from the rendition of the decree, and that upon the payment of the amounts above specified, then defendant was to stand seized of one undivided half of the land for the use and benefit of the county of Adair and the State.

There is no law in this State for the allowance of ten per cent. interest, except on written contracts where the parties have agreed upon that rate. In all other cases, except where special provision is made in the statute, where interest is given, six per cent. only can be charged. Plaintiff could not be made responsible for the four hundred dollars paid by defendant to Brown for the purchase of the property on the re-sale back to him. Defendant's whole transaction in that regard was illegal, and he took upon himself all the risk. The only thing, which plaintiff was in anywise liable to account for, was the fifty dollars paid to complete the title. That inured directly to his benefit, and justice would demand that he should compensate the defendant for it. The balance of the decree is not justified by any issue made in the pleadings.

There was nothing to authorize the holding that the defendant should stand seized to the use and benefit of the county and State. No such issue was raised in the cause. Whether it would be proper would depend on circumstances, the evidence of which the record does not disclose. If the plaintiff has satisfied the indebtedness for which the assignment was made, then the property should be returned to him. If not, his creditors, for whom the assignment was executed, may still, by a proper proceeding, subject the same to their claims. But they were not before the court, and the defendant had been discharged and had no power to act, indeed he did not attempt anything of the kind.

The judgment should be reversed and the cause remanded ; the other judges concur.

Hollyman v. Hann. & St. Joe. R. R. Co.

HARMON D. HOLLYMAN, Respondent, *vs.* HANN. & ST. JOE. R.
R. Co., Appellant.

1. *Practice, civil—Trials—Railroads—Injury to stock—Double damages.*—In an action under section 43 of the railroad incorporation law (Wagn. Stat., 310-11) against a railroad, for injury to stock, accruing from the failure of the railroad to erect and maintain suitable fences and cattle-guards, when the jury finds the actual damages, it is not error for the court to double them.

Appeal from Marion Circuit Court.

James Carr, for Appellant.

E. McCabe, for Respondent.

WAGNER, Judge, delivered the opinion of the court.

The only error, that the defendant complains of, is the action of the court in giving double damages. The case was originally brought before a justice of the peace for the killing of two steers by the defendant's cars, and in the justice's court plaintiff recovered judgment. Upon an appeal the verdict was again for the plaintiff, and the jury found that the actual damage sustained by him was eighty-eight dollars, and on motion this amount was doubled by the court. The complaint stated that the action was brought in accordance with section 43 of the railroad incorporation law, and that the killing took place at a point, where the railroad passed through an inclosed field, and that the defendant had failed to construct and maintain suitable cattle-guards at a public crossing, near where the steers were killed, so as to prevent cattle from getting on the tract of the road; and that by reason of such insufficient guards, the steers got on the track and were killed.

For the plaintiff, the court instructed the jury, that, if they believed from the evidence, that the cattle got upon the defendant's track, and were killed by a locomotive or cars, at a point where the track passed along, through, or adjoining, inclosed or cultivated fields, by reason of the failure and neglect of the defendant to maintain suitable and sufficient cattle-guards, so as to prevent them from getting on the track,

Stewart v. Glenn, Adm'r.

then the jury should find for the plaintiff the actual damages which he had sustained. The law requires that railroad companies shall construct and maintain cattle-guards at all railroad crossings, where it is made necessary to erect fences suitable and sufficient to prevent animals from getting on the track, and it is provided, that, until such guards are made and maintained, the corporations shall be liable in double the amount for all damages, which shall be done to any cattle or animals on the road, occasioned by the failure to construct such guards.

Although the statement or claim is badly drawn up and is somewhat defective, yet in substance it is sufficient. It states that the accident happened where the road ran through an inclosed field, and that the cattle strayed on the track in consequence of the failure and neglect of the company to erect and maintain cattle-guards at a public crossing. Under the instruction of the court, the jury must have found this to be true, and that the neglect of the company to perform the statutory requirement, of maintaining suitable and sufficient cattle-guards, was the proximate cause of the killing. As the corporation was in default, the statute declares, that it shall be liable in double the amount of damages done by its agents, engines and cars, to all animals, by reason of its neglect. The jury found the actual damages, and the court did not err in doubling them.

Judgment affirmed; all the judges concur.

AUSBIN STEWART, Appellant, vs. JAMES M. GLENN, ADM'R OF
THOMAS GLENN, DEC'D, Respondent.

1. *Practice, civil—Affidavit—Amendment of—Embezzlement of notes.*—In suit against an administrator, for embezzling notes, given by him to the deceased, the court may, in its discretion, refuse to permit plaintiff to file an amended affidavit, embracing, in his charge, other and different notes, the evidence showing no injury resulting to plaintiff by reason of such refusal.

 Stewart v. Glenn, Adm'r.

Amendments should always be permitted on such terms as may be imposed, unless the applicant has been guilty of *laches*. But in all such cases, a large discretion must be given to the court.

2. *Evidence—Admissions of deceased persons, when competent.*—Statements of deceased persons, when in the nature of admissions, or made in connection with and in explanation of acts of the deceased, are competent evidence.
3. *Administrator—Testimony of, as to embezzlement of notes of deceased—Witness act, etc.*—In suit against an administrator for embezzling and failing to inventory notes, given by him to the deceased, the administrator is not incompetent under the statute (Wagn. Stat., 1372-3, § 1). The issue in such a case is not a contract to which the deceased was a party, but the receipt and embezzlement or concealment of the notes by defendant.
4. *Administrator—Embezzlement of notes by—Notes must be in possession of—Constr. Stat.*—Under the statute (Wagn. Stat., p. 85, §§ 7, 8, 10, and 11) an action against an administrator, for concealing and embezzling notes, will not lie, unless they are in his possession at the commencement of the proceeding.

Appeal from Montgomery Circuit Court.

W. L. Gatewood, for Appellant.

I. The court below erred in refusing to allow plaintiff to amend his affidavit, after appeal to Circuit Court, changing the affidavit in amount only and not in form; (Wagn. Stat., p. 1034, §§ 3, 4 and 5; *Martin vs. Martin*, 27 Mo., 227;) 2nd. in admitting the defendant to testify as to settlements made with his father, and payments made to him previous to his death; (Wagn. Stat., p. 1372, § 1; *Stanton vs. Ryan*, 41 Mo., 510;) 3rd. in admitting the declaration of deceased as to what disposition should be made of the notes. (*Howell's Adm'r vs. Howell & Co.*, 37 Mo., 124; *Perry's Adm'r vs. Roberts*, 17 Mo., 31, 40; *Gibson vs. Gibson*, 24 Mo., 227; *Cawthorn vs. Haynes*, 24 Mo., 236.)

Cariker, Powell & Hughes, for Respondent.

I. The declarations of Thomas Glenn, deceased, against his interest, and tending to show that the notes were paid off, were admissible, while those tending to show the contrary were not. A man's statements against his interest are always admissible, but he cannot manufacture evidence in his own favor. The distinction is as old as the law. (*Hart vs. Hart*, 41 Mo., 441; *Wynn vs. Cory*, 48 Mo., 346.)

Stewart v. Glenn, Adm'r.

II. James Glenn was a competent witness. The issue was one of embezzlement. The charge is made by a party living against one who is living. (Tingley vs. Cowgill, 48 Mo., 291; Looker vs. Davis, 47 Mo., 140; Fugate vs. Pierce, 49 Mo., 441; Manufacturer's Bank vs. Schofield, 39 Vt., 590.)

III. This is a statutory remedy for the recovery of specific personal property, and it devolves on the plaintiff to prove that it was in the possession of the defendant, or under his control. (Dameron vs. Dameron, 19 Mo., 317; Powers vs. Blakey, Adm'r, 16 Mo., 437; Howell's Adm'r vs. Howell, 37 Mo., 124.)

VORIES, Judge, delivered the opinion of the court.

This proceeding was commenced in the Probate Court in Montgomery county, against the defendant, who was the administrator of the estate of Thomas Glenn, deceased, charging him with embezzling, concealing and failing to inventory certain notes held by the deceased at the time of his death, against said defendant, and which formed a part of the assets of said estate.

A judgment was rendered in favor of the defendant in the Probate Court, from which the complainant, who it is admitted is interested in the estate, appealed to the Montgomery Circuit Court.

A trial was had in the Circuit Court before a jury. The jury found for the defendant, and judgment was again rendered in his favor. The complainant filed a motion for a new trial, which being overruled he appealed to this court.

On the appearance of the parties in the Circuit Court, the complainant asked leave of the court to file an amended affidavit to more particularly describe the notes named in the original affidavit, and also to include other notes not before named, and which had been ascertained since the trial in the Probate Court. The court permitted the amendment, so as to give a more particular description of the notes named in the original statement and affidavit, but refused to permit the complainant to amend his complaint so as to include any ad-

ST. LOUIS.

Stewart v. Glenn, Adm'r.

ditional notes not before named : to which refusal of the court the complainant excepted.

The sworn statement or affidavit, upon which the trial was had, charged that the defendant, as administrator of Thomas Glenn, deceased, had concealed or embezzled, or had in his possession and under his control, and had failed to inventory or account for, certain notes belonging to said estate, to-wit: one note for \$260, given by defendant to deceased, dated in the year 1864, and one note for \$140, dated, etc., given by defendant to said deceased, with interest, etc.; that said defendant, as administrator of Thomas Glenn, deceased, had failed and refused to account to the Probate Court of Montgomery county for the same, and now has them in his possession, or under his control, and fails to inventory the same.

The complaint or affidavit was denied by the defendant.

The evidence on the part of the plaintiff tended to prove the facts stated in the affidavit, and the evidence on the part of the defendant tended to prove that the notes named in the affidavit had never come into the hands of the defendant as administrator of said estate; and that he knew nothing of them since the death of the deceased. It is not disputed that the deceased just before his death, held such notes on the defendant, but defendant testifies that the amount of the notes had been paid except as to a balance of \$260, and insists that his father had intended to cancel said notes, and not to exact the payment of the balance due thereon, and that no such notes were found after the death of deceased; but as to the intention of deceased to cancel or destroy the notes, the evidence is conflicting. It is shown that the deceased lived at the house of defendant, and his papers were there only a few days before his death, including these notes.

There were several exceptions taken to the admission and exclusion of evidence on the trial, which are not deemed to be material to the investigation of this case. We will therefore only notice those objections to evidence which go to the merits of the case.

The plaintiff proved by a witness, that he had seen the notes described in the affidavit in the possession of the deceased, a short time before his death. The defendant in the cross-examination of said witness, asked the witness as follows: "What did the old man say about James paying the notes?" The plaintiff objected to this evidence for the reason that the statements of deceased as to the payment of the notes, or as to his intention to collect the same, were not competent or material evidence. This objection was overruled, and the plaintiff excepted. The witness stated that deceased had said that he held the notes against James, but that he did not intend that James should pay the notes, as he had been taken care of by James and his wife, etc.

The defendant was offered as a witness on his own behalf. The plaintiff objected to his testimony on the ground that he was not competent to testify against the deceased, or in this case. The court overruled the objection and the defendant was permitted to testify in the cause, to which the plaintiff excepted.

After the defendant had proved that the deceased in his life-time had stated that he did not intend to collect the notes from defendant, the plaintiff offered to prove statements of the deceased, made at other times, in which he had expressed a different intention. This evidence was objected to and rejected by the court and the plaintiff excepted.

At the close of the evidence, the court gave the jury several instructions to which no objections were made; but refused to give the jury the following instruction: "The jury are instructed that if they believe from the evidence in this case, that the defendant James M. Glenn is and has been the only administrator on the estate of said Thomas Glenn deceased, and that said Thomas died intestate and the holder and owner of the notes or either of them described in plaintiff's affidavit herein filed; and that said James M. Glenn made and executed said notes or either of them, and knew or had just cause to believe that said Thomas Glenn died the holder and owner of the same, and further find that the said

James M. Glenn, as administrator, did not nor has caused the same to be inventoried as the other property or indebtedness of said estate, then your verdict should be for the plaintiff, although you may further believe from the evidence, that said notes, after the death of said Thomas, did not come into the actual possession of said defendant." To the refusal of the court to give this last instruction the plaintiff excepted.

The court then, at the instance of the defendant, and notwithstanding the objections of the plaintiff, gave the jury the following instruction: "The jury are instructed that this is a proceeding under the administration law, denominated Embezzlement, and instituted upon the affidavit of Stewart for the recovery of certain specific personal property, viz: Two notes alleged to belong to the estate of Thomas Glenn, deceased, and to be in the possession of the defendant James Glenn; and in order to maintain this proceeding, the property alleged to have been embezzled, must have been in existence in kind and in the actual possession of the defendant at the time of the filing of the affidavit on the 5th day of August, 1872, or since deceased's death, and unless the jury believe from the evidence, that the notes specified were in existence in kind, and were in the actual possession of the defendant at said date, they must find the defendant not guilty."

There were other instructions given on the part of the defendant and others refused on the part of the plaintiff, but those copied are sufficient to show the theory on which the case has been argued here on the part of the respective parties.

The first ground of objection urged in this court is, that the court erred in refusing to permit the plaintiff to file an amended affidavit embracing other and different notes than those described in the original affidavit. Our statute is very liberal on the subject of permitting amendments, and we think that whenever an amendment is asked by either party during the progress of a cause, and facts are made to appear showing that the interest of the party asking for the amendment, requires that the amendment should be made, the court should

Stewart v. Glenn, Adm'r.

always permit the amendment on such terms as would be just to the adverse party, unless the party asking for the amendment has been guilty of laches on his part; but in all such cases a large discretion must be given to the court to which the application is made whose duty it is to see that no injustice is done to either party if it can be prevented. (*Martin vs. Martin*, 27 Mo., 227; *Wagn. Stat.*, 1034, §§ 3, 4 and 5.) In the present case we cannot see, from the whole record in the case, how the plaintiff has been injured by the refusal of the court to permit the amendment, as the evidence offered on the claims which the plaintiff sought to insert in the affidavit could not have changed the result of the case.

It is next objected that the defendant was permitted to give in evidence, statements made by the deceased at the time at which plaintiff had proved by the same witness that the deceased had the same notes in his possession. This evidence was admissible. The evidence consisted of statements made by the deceased in reference to notes which were then in his possession. The plaintiff had proved by the witness that the deceased had shown the witness the notes, and it was certainly proper that the witness should state what was said by the deceased about the notes at the time. It was attempted by the plaintiff to prove by circumstantial evidence, that the notes remained at the time of the death of the deceased, and that they had come to the possession of the defendant. The statements of the deceased as shown by the evidence had some tendency, although it might be but slight, to rebut the presumption that the notes had remained at the death of the deceased and came into the possession of the defendant. (*Hart vs. Hart's Admr.*, 41 Mo., 441; *Wynn vs. Cory*, 48 Mo., 346.)

It is next insisted by the plaintiff that the defendant was an incompetent witness, and that the court erred in receiving his evidence. This objection is predicated on the first section of our statute concerning witnesses. (*Wagn. Stat.*, 1870, p. 1372.) The statute permitting parties to testify in their own behalf, is as follows: "Provided, that in actions where one of the original parties to the contract or cause of

Stewart v. Glenn, Adm'r.

action in issue and on trial is dead or insane, the other party shall not be admitted to testify in his own favor."

Now the question is, what was the cause of action in issue and on trial in this case? The real matters in issue were whether certain notes described in the affidavit, which was the foundation of the proceeding, had ever come to the possession of the defendant as administrator of his father's estate, and whether he had concealed and embezzled the same? There was really no contract in issue to which the deceased was a party. It is true, that it was necessary to prove that the notes once existed; but no contract was in issue to which the deceased was a party. If the notes were in existence at the time of the death of the deceased, and came into the possession, or under the control of the defendant as his administrator, these things must have happened after the death of the deceased, and in the nature of things, the deceased could not have been a party to these transactions. The defendant was certainly competent, under the statute, to testify to these material facts in the case. Whether he also testified to facts that he had no competency to testify to, we are not called upon to decide in this case. The objection to the witness was a general one as to his competency, and as he was clearly competent to testify to the main facts in issue, the objection to his general competency was properly overruled.

The last and principal point in this case, grows out of the instruction given by the court on the part of the plaintiff. Must the notes named in the plaintiff's affidavit have existed in fact, and have been in the possession of defendant at the time of the commencement of the proceeding? is the question in the case. The court instructed the jury, that these facts must exist in order to authorize a recovery in the case, and this action of the court is the main ground insisted on for the reversal of the judgment.

By the 7th section of the 2nd article of the act concerning administration, (Wagn. Stat., 85,) it is provided as follows: "If the executor or administrator, or other person interested in any estate, file an affidavit in the proper court, stating that the

Stewart v. Glenn, Adm'r.

affiant has good cause to believe, that any person had concealed or embezzled any goods, chattels, money, books, papers or evidence of debt of the deceased, and has them in his possession or under his control, the court may cite such person to appear before them, and compel such appearance by attachment, and examine him and other witnesses on oath, for the discovery of the same."

The 8th section of the same act provides; that "If any person interested in any estate, file a like affidavit against an executor or administrator, the court shall have the same power to cite him, and compel his appearance and examination as in case of other persons."

The 10th section of the act provides for a trial by a jury, and the 11th section provides that the judgment, in case of conviction of persons, other than executors and administrators, shall be for the chattels named; and that the court may compel a delivery thereof, by attachment, and in case the person convicted be an executor or administrator, the court shall compel him to inventory, and have the same appraised as the property of the estate.

It will be seen, that the statute provides a special summary proceeding for the recovery or discovery of specific articles of property, set forth in the statutes, which have been concealed or embezzled by a party, who has them in his possession at the time. In pursuing this special remedy, the statute must be followed, and we are not authorized to use the statute for any other purpose than the special purposes named in the act. The act is for the discovery and recovery of an article of property, or a thing concealed or embezzled by the party proceeded against, and which is in his possession. It is not for the discovery of a fact, which is unknown, and thus establishing a debt against the administrator, as the attorney for the plaintiff has argued; but the article or thing named in the affidavit must be found to be concealed, or to have been embezzled by the defendant, and when the article or chattel is found to be in the possession of a person, not an executor or administrator, the court compels him to deliver the property

or evidence of debt to the administrator or the executor, or if it is an executor or administrator who has concealed the thing named, he will be compelled to have the same inventoried and appraised, etc.

The present act under which this proceeding was had, is substantially the same as the act of 1845 on the same subject, except that the act of 1845 did not make the proceeding applicable to executors and administrators; but the nature of the proceeding and the manner of proceeding is the same under both acts in all essential particulars; except a different form of judgment is rendered against an executor or administrator, growing out of the fact that the possession of the property in such case is not to be changed, but is merely required to be inventoried. Under the act of 1845, it has been frequently held, that no recovery could be had, unless the defendant had the possession of the thing charged to be concealed at the time the proceeding was commenced, and we think the present statute makes no change in that particular. (*Dameron vs. Dameron*, 19 Mo., 317; *Powers vs. Blakey*, 16 Mo., 437; *Howell vs. Howell*, 37 Mo., 124.)

The instructions given by the court, fairly placed the case before the jury under the facts in evidence, and the law as construed in the cases above cited. The instruction given on the part of the defendant, although not very clear and formal was substantially correct. It follows that the instruction refused by the court was properly refused.

The judgment is affirmed; the other judges concur.

MISSISSIPPI RIVER BRIDGE CO., Appellant, vs. EDWARD RING,
Respondent.

1. *Statutes, construction of—Railroads—Condemnation of land.*—The statute authorizing the appropriation of land for railroad purposes (Wagn. Stat., 326) is in derogation of the common law, and should be liberally construed in favor of those whose rights are to be affected by it.
2. *Railroads—Condemnation of land—Commissioners, report of—Review—Evidence—Alteration.*—Upon exceptions filed to the report of commissioners appointed to condemn land for railroad purposes, the court should review by evidence the action of the commissioners, and supervise their finding so as to do substantial justice. The court may approve or reject the report, but cannot alter it.
3. *Railroads—Land, condemnation of—Removal of property—Ownership—Trespass.*—After the condemnation of land in favor of a railroad, the property thereon belongs to the railroad, and if the former owner removes any of it he will be liable to an action of trespass.
4. *Lands, condemnation of—How to be appraised.*—In condemning land its value is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply with reference to its productiveness to the owner in the condition in which he has seen fit to leave it.
5. *Lands, condemnation of—Benefits, how assessed.*—In proceedings to condemn land, the benefits, which are to be assessed against a tract of land, are the benefits resulting to that tract in particular, and not the general benefits accruing to it in common with other land which is enhanced in value by the erection of the improvements.

Appeal from Pike Circuit Court.

T. J. C. Fagg, for Appellant.

I. The court had no right to inquire into the value of the property taken from the premises, and to deduct that value from the amount of damages as ascertained by the commissioners. (*Brainard vs. Clapp*, 10 Cush., 6.)

II. The court is not authorized to fix the amount of compensation upon hearing the testimony. The court can only affirm or set aside the report. (Wagn. Stat., 328, § 4; *Han. Bridge Co. vs. Schaubacker*, 49 Mo., 555.)

III. As to general principles of condemnation, under statute of New York, see *Troy & Boston R. R. vs. North. Turnp. Co.*, 16 Barb., 100.

Mississippi River Bridge Co. v. Ring.

Sharp & Broadhead, for Respondent.

I. The court is not bound to confirm or reject the report; its supervisory power is not confined to technical errors. It may do what is right and just in the premises. (Wagn. Stat., 328, § 4; Han. Bridge Co. vs. Schaubacker, 49 Mo., 558.)

II. The deduction in the report was made by the court with the consent of the respondent.

WAGNER, Judge, delivered the opinion of the court.

This was a proceeding by the plaintiff, a duly organized corporation under the laws of this State, to condemn land for the approaches to its bridge. By its counsel it presented its petition to the judge of the Circuit Court, for the appointment of commissioners, and commissioners being appointed in pursuance of law, they entered upon the discharge of their duties. After viewing the land sought to be taken, they awarded to the defendant \$2,500 as damages sustained by him.

In due time after the report was filed plaintiff filed exceptions to the same, because, 1st. The damages were excessive and exorbitant, and that the defendant had, after the making of the award, removed from the ground, over which plaintiff's right of way was located, property which was included in the amount of damages; and 2d. that the proceedings of the commissioners were irregular and illegal, and not in conformity with the requirements of law.

Upon the hearing of exceptions to the report, each side introduced witnesses, and there was great diversity in their testimony as to the damages. For the plaintiff, the witnesses did not consider that the defendant was in anywise injured, if he continued to use the property for the purpose of pork packing. For the defendant, some of the witnesses placed his damages as high as three thousand dollars. Whilst some of them considered the property very valuable, and thought it would be greatly injured, others founded their opinion upon

what it would be worth if used for another business, for which it was deemed peculiarly adapted.

The property removed consisted of a corn crib, which was on the land when the commissioners viewed the same and made their report, and which the court found was of the value of one hundred and fifty dollars, which amount it deducted from the award, and then confirmed the report. From this ruling the plaintiff appealed.

Three points are now relied on by the counsel for the appellant, for a reversal of this case: First. That the court had no power under the statute to try the question of compensation, or undertake to fix by its judgment the amount to be paid for the use of the ground; Secondly. That after it was found that there had been a change in the property, produced by the act of the owner himself, affecting the value or compensation, the only action the court could rightfully take in the premises would be to set aside the report and appoint new commissioners; and, Thirdly. That the property in question being, at the time it was sought to be appropriated, used exclusively for the purpose of slaughtering hogs and packing pork, the question of the amount of damages sustained should have been confined exclusively to that business, and that there could be no inquiry as to what the property would be worth for any other purpose.

The statute, under which the parties acted in the matter of condemnation, provides, that the report of the commissioners may be reviewed by the court in which the proceedings are had, on written exceptions filed by either party in the clerk's office within ten days after the filing of such report, and the court shall make such order therein as right and justice may require, and may order a new appraisement upon good cause shown. (Wagn. Stat., 328, § 4.)

It will be observed, that this section gives the court extensive supervisory and discretionary power over the report. It may not only review the proceedings, but it is permitted to go further, and make such orders touching the premises as right and justice may require; and if it be of the opinion,

upon reviewing the case, that it would be more conducive to justice to order a new appraisement, it may take that course. It is not perceived how the court can well review the report, so as to make an order therein according to right and justice, unless it receives evidence so that it can become possessed of the facts.

In the case of the Hannibal Bridge Co. vs. Schaubacker, (49 Mo., 555) it was held, that under the statute the finding of commissioners, appointed to appraise land to be condemned for approaches to a bridge, was not conclusive upon the Circuit Court, but that on written exceptions filed by either party, the court might re-examine the evidence, and, if the report of the commissioners was wrong, it might set the same aside. In that case the commissioners had obviously done great injustice to the party whose land was sought to be appropriated, and the court, when the exceptions were filed, treated the finding of the commissioners as conclusive, and refused to hear any testimony on the subject. Had this view of the law been correct, the party would have been wholly remediless, and would have been deprived of his property, not only against his consent, but without obtaining any just or adequate compensation therefor.

As the statute is in derogation of the common law, and invests corporations with the high prerogative of condemning and taking property against the will of the owner, it should be liberally construed in favor of those whose rights are to be affected by it. And this would certainly lead to the conclusion that the court should review by evidence the action of the commissioners, and supervise their finding so as to do substantial justice.

The very question in contention in this case was presented in *St. Louis, &c. Ry. vs. Richardson*, (45 Mo., 466). There the commissioners, in the discharge of their duty, returned their report, in which they assessed damages to the defendant. The plaintiff then moved the court to set aside the award, on the ground that the assessment of damages was excessive, and that the commissioners did not take into consid-

eration the advantages and disadvantages which would accrue to the defendant by reason of the construction of the road. Upon the hearing of the motion the plaintiff introduced several witnesses, who testified that they were acquainted with defendant's land, over which the road was located, and that they knew in what manner the road passed through the land; that the land was worth more after the location of the road than it was before, and would sell for more. With this evidence before the court, the motion was overruled, and judgment given confirming the report. The case was then brought to this court, where the judgment was affirmed. And in the reasoning of the opinion it was observed, that the commissioners did not act like an ordinary judicial tribunal. Their judgment was not made up exclusively on evidence submitted to them. They might arrive at their conclusion upon the proof and allegations of the parties; and in addition thereto they were required to view the premises, and therefore they had the advantage of an actual personal inspection. They were generally selected on account of their capacity and fitness, and were required to be disinterested; and unless the court was clearly satisfied that they had erred in the principles upon which they had made their appraisal, there was nothing for review, and their report should not be disturbed; that the testimony of witnesses as to value, whilst it was admissible, was not controlling. It was simply their opinion, and certainly could not be allowed to have greater weight than the deliberate official acts of the commissioners, who had equal, if not superior, advantages for forming a correct judgment.

In reference to the action of the court, in modifying the verdict by deducting the value of the corn crib taken away by the defendant after the appraisal was made, it is admitted that it was not strictly in pursuance of law. I think the statute does not warrant such a proceeding. The court may take evidence to review the report, to see whether it should be approved, or rejected and set aside and new com-

missioners appointed. But I can nowhere find that it was ever designed, that upon reviewing the case upon exceptions, the court is authorized to make any alteration, either by adding to or deducting from it. After the condemnation the crib would undoubtedly have been the property of plaintiff, and the defendant, like any other person, would have been liable in trespass for removing it. But in that case plaintiff could only have recovered the value, and that has been obtained by the action of the court, and although it proceeded erroneously and irregularly, yet substantial justice has been done, and the judgment ought not to be disturbed on that account.

The plaintiff has got what it would have gained had it brought an action for the conversion of the crib, and therefore it cannot be said that it has been injured.

We cannot subscribe to the doctrine insisted upon by the counsel, that, because at the time the appraisement was made the property was used for slaughtering hogs and packing pork, the estimate of the commissioners should have been made in reference to the injury to the property for that business exclusively, and that nothing else could be taken into consideration. That would preclude the owner of the property from ever making any change in his business, or using his property for other purposes, so far as assessments were concerned. It would compel a sacrifice, and confine him in one line of trade, though it might be entirely ruinous. On the other hand, the estimate should not be based upon matters purely speculative or fanciful, which may or may not happen. The correct rule to be applied relates to the value of the land to be appropriated, which is to be assessed with reference to what it is worth for sale, in view of the uses to which it may be put, and not simply in reference to its productiveness to the owner in the condition in which he has seen fit to leave it. And where less than the whole estate is taken, then there is further to be considered how much the portion not taken is increased or diminished in value in con-

sequence of the appropriation. (Cooley Const. Lim., 567-8, and notes.)

The benefits derived, which are to be taken into consideration in the assessment of damages, are the direct and peculiar benefits resulting to the land in particular, and not the general benefit accruing to it in common with other land which is enhanced in value by the erection of the improvements. (St. Louis, &c. Ry. vs. Richardson, *supra*, and cases cited.)

The testimony of the witnesses, introduced by the plaintiff in opposition to the report, was all in reference to the business in which the property was at that time used, and was therefore founded on a wrong theory, and the court did right in disregarding it. There is nothing to show that the court erred in exercising its revisory power, and the judgment should be affirmed.

The counsel for the respondent have filed a motion asking not only for an affirmance, but for six per cent. interest on the judgment from the date of its rendition, and also an addition of ten per cent. as damages. The six per cent. interest will be allowed, but we do not consider this a case calling for the infliction of damages, and that part of the motion will be overruled.

The judgment will be affirmed; the other judges concur.

Campbell v. St. L. & I. M. R. R. Co.

ALFRED CAMPBELL, Respondent, vs. ST. LOUIS AND IRON MOUNTAIN RAILROAD Co., Appellant.

1. Clemens vs. Hann. & St. Jos. R. R. Co., 53 Mo., 367, affirmed.

Appeal from Madison Circuit Court.

J. B. Duchouquette, for Appellant.

Dryden & Dryden, for Respondent.

NAPTON, Judge, delivered the opinion of the court.

This was an action before a justice of the peace for the loss of some rails and destruction of some grass, occasioned by an escape of sparks of fire from the locomotive of defendant in passing through plaintiff's farm. The petition charged negligence on the railroad company. The fact of the loss and its cause was proved by the plaintiff; and no evidence was offered by the company, the defendant, to disprove negligence. A verdict and judgment were rendered for plaintiff for \$30, which must be affirmed, as the case falls within the rule adopted by the court in a similar case in Clemens vs. Hann. & St. Joe. R. R. Co., (53 Mo., 367,) and in the cases therein cited of Bedford vs. Hann. & St. Joe. R. R. Co., (46 Mo., 456,) and Fitch vs. Pac. R. R. Co., (45 Mo., 322).

Judgment affirmed; the other judges concur.

END OF OCTOBER TERM, 1874, AT ST. LOUIS.